

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

-----: :
SONY MUSIC ENTERTAINMENT, et al.,: :
Plaintiffs, : :
-vs- : Case No. 1:18-cv-950
COX COMMUNICATIONS, INC., et al.,: :
Defendants. : :
-----: :

VOLUME 11 (A.M. Portion)

TRIAL TRANSCRIPT

December 17, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

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1 P R O C E E D I N G S

2 NOTE: The December 17, 2019, morning portion of the
3 case begins in the absence of the jury as follows:

4 JURY OUT

5 THE COURT: All right, good morning. I see all
6 counsel are here. Good morning to everyone.

7 We have some preliminary matters, Mr. Buchanan?

8 MR. BUCHANAN: Yes, Your Honor.

9 THE COURT: We --

09:06:45 10 MR. BUCHANAN: Cox would like to move into evidence
11 DX 96, which was introduced during the video testimony of
12 Mr. Paszkowski.

13 THE COURT: Okay.

14 MR. BUCHANAN: I don't think there's any objection.

15 THE COURT: Any objection? All right. It's
16 received.

17 MR. OPPENHEIM: Well, I don't know. This wasn't
18 raised with us beforehand, so -- but we'll take a look at it,
19 Your Honor.

20 THE COURT: Okay.

21 MR. BUCHANAN: I mean -- okay. Go ahead.

22 MS. LEIDEN: This was actually addressed through
23 e-mail negotiations prior to the video being shown, and I gave
24 plaintiffs' counsel notice about exhibit a couple of times last
25 week, including --

1 MR. GOULD: No objection, Your Honor.

2 MS. LEIDEN: Okay. Thank you.

3 THE COURT: All right. 96 is received.

4 MR. GOULD: Wanted to double-check.

5 MR. BUCHANAN: And, Your Honor, yesterday with regard
6 to the copyright registrations, the Court admitted them subject
7 to the plaintiffs reviewing the list, and I assume they've done
8 that. So we would move into evidence PX 612 to PX 8478, the
9 electronic version of those copyright registrations and
09:08:03 10 lookups.

11 THE COURT: All right. Any objection?

12 MR. OPPENHEIM: Yes, Your Honor.

13 THE COURT: Okay.

14 MR. OPPENHEIM: Your Honor, yesterday when the issue
15 came up, and I asked what they were actually seeking to admit,
16 Ms. Leiden indicated to the Court and us that they were seeking
17 to admit DX 3758. I don't know -- to this day, I still don't
18 know what DX 3758 was.

19 Ms. Golinveaux came up to us yesterday afternoon and
09:08:34 20 said, no, no, no, that's not what we're trying to admit. We're
21 trying to admit PX 612 to 8478. So it seems to be a
22 back-and-forth here.

23 Now, we have not reviewed in great detail the
24 7,200-plus documents that that includes. It does, however,
25 include registrations for works that aren't even in the case.

1 It -- it's -- it is -- this is why -- I mean, the plaintiffs
2 would never have proceeded -- we put it on our list initially
3 out of an abundance of caution. We would have cleaned it up
4 before trial, and that's what we did. Now we've got this
5 wholesale effort to just throw everything against the wall and
6 admit it, and I think it's improper.

7 Also, by the way, none of these exhibits have ever
8 been marked, so I don't know what's on the hard drive. What --
9 we had them on a list, but we don't actually have hard copies.
09:09:31 10 We have no idea that what we're talking about is 347 -- 612 to
11 8478 is what they're talking about. So we would object, Your
12 Honor. This is improper.

13 THE COURT: Where did it come from? It came from --
14 Sony produced the registrations, and how would it be --

15 MR. OPPENHEIM: So --

16 THE COURT: -- that they don't include registrations
17 for songs or music that aren't at issue in the case?

18 MR. OPPENHEIM: During the course of the case, we did
19 a very large production. As Your Honor is well aware, that
09:10:04 20 production often included works that we ended up not proceeding
21 on. And, you know, sometimes you produce things out of an
22 abundance of caution because you don't know where things are
23 going, and from our perspective, we'd rather overproduce than
24 underproduce.

25 When we put these on our initial exhibit list, we

1 didn't go through them and say, do we have absolutely every
2 registration that corresponds to the works in suit? We put
3 the -- we put a list out so that we had a placeholder because
4 we didn't want, if we needed them, for anybody to come back
5 later and say, you didn't put them on.

6 We've not had an opportunity to go through and figure
7 out of these 7,200-plus exhibits that they propose putting
8 on -- putting into evidence, how they match up. We don't know
9 that it includes everything, but we do know that it includes
09:10:58 10 more than it needs to.

11 This is -- you know, I recognize I made this argument
12 yesterday and I lost, but I'll make it again because I think
13 it's the right argument, which is the defendants should have --
14 if they wanted to put this in evidence, they should have had it
15 on their exhibit list, and they didn't. They didn't produce --
16 they didn't put it in. They haven't established any foundation
17 for it. There is no basis for these registrations to go in,
18 Your Honor.

19 And when we get to the next issue, Your Honor, which
09:11:31 20 is the issue of Mr. Tregillis's ever-evolving analysis in
21 slides, which have changed now, I think, three times since,
22 since we initially discussed it, it just -- it further
23 demonstrates that this is a last-minute effort and this is
24 exactly what isn't supposed to happen at trials, Your Honor.

25 THE COURT: But what is the -- are registrations of

1 the accused infringing works already in evidence?

2 MR. OPPENHEIM: No.

3 THE COURT: They're --

4 MR. OPPENHEIM: No.

5 THE COURT: They're -- I mean, what relevance do they
6 have? I'm just seeking where -- just trying to understand --

7 MR. OPPENHEIM: The Court already determined -- I'm
8 telling you what you did.

9 THE COURT: Yeah. No --

09:12:20 10 MR. OPPENHEIM: That the works in the case, the
11 10,017 works in the case are owned by the plaintiffs and
12 properly registered.

13 THE COURT: All right.

14 MR. OPPENHEIM: That doesn't mean that the
15 registrations have been admitted, and, in fact, there's no
16 reason to admit them. That's why we took them -- took off the
17 list everything that could possibly have been a registration.

18 So now the defendants want to find a way of throwing
19 this evidence in at the last minute, without a single witness
09:12:47 20 to testify about it, without having reviewed these to make sure
21 that it is -- that it is -- addresses the specific works in
22 suit, and haven't set forth how the jury could possibly use
23 this. This is really -- this whole last-minute thing is
24 intended to confuse not only the jury but the rest of us.

25 And if I can turn to the Tregillis slides, because it

1 all goes hand in hand.

2 THE COURT: Yeah, go ahead.

3 MR. OPPENHEIM: So yesterday I asked the Court for an
4 opportunity to review and consider the slides in a little more
5 detail, and as I promised, my colleagues, who are a lot smarter
6 than I am, took a look at them and said this doesn't make a lot
7 of sense.

8 And sure enough, the defendants, they're trying to
9 fix their mistakes. As of 9:30 last night, they send us a
09:13:45 10 revised version of the slides with different numbers than were
11 in the original version. And then this morning, I got handed
12 yet additional slides, which have yet other numbers.

13 This just demonstrates, Your Honor, this was never an
14 analysis that was previously done by Mr. Tregillis. This is an
15 analysis that is being done on the last day of a trial, and
16 this is exactly what isn't supposed to happen here.

17 THE COURT: So what is it that you think --

18 MR. OPPENHEIM: Oh, Mr. Tregillis should be excused.
19 I'm sorry, Your Honor.

09:14:16 20 THE COURT: Mr. Tregillis, please wait outside.
21 Thank you, sir.

22 MR. TREGILLIS: Sure. Thank you.

23 NOTE: Mr. Tregillis left the courtroom.

24 THE COURT: So I looked -- I had a chance to look at
25 it last night as well, and Mr. Tregillis in his opening report

1 references the copyrights and the tracks and, slash, songs, and
2 has Schedule 6, which identifies the songs and the music and
3 the overlap of which ones -- which accused songs and music
4 overlap, right? So that's in this Schedule 6.

5 MR. OPPENHEIM: I believe if you look at the bottom
6 of that Schedule 6, Your Honor, the -- it references 2,000 or
7 2,200 works.

8 THE COURT: Right.

9 MR. OPPENHEIM: I'm just pulling it up here, which is
09:15:22 10 clearly -- that was -- I don't know where he came up with that
11 number, but that's never been a number in this case.

12 THE COURT: Right.

13 MR. OPPENHEIM: So there was no way we could look at
14 this and say, boy, he's done an analysis as to all the works in
15 suit, the 10,017.

16 THE COURT: So he can't use this to come up with the
17 numbers of songs and music compositions which have -- which are
18 together in one --

19 MR. OPPENHEIM: -- SR.

09:16:02 20 THE COURT: Where the song and the composition are
21 included in the infringing work.

22 MR. OPPENHEIM: I believe that what -- when he's
23 asked, what he will say is that he looked at some version of
24 PX 1 and PX 2, which is -- has been put before the jury so they
25 can see the works in suit.

1 THE COURT: All right.

2 MR. OPPENHEIM: He's not looked, as far as I know,
3 and if he has, it's certainly not in his report, looked at a
4 single underlying copyright registration. He's not looked at
5 whether or not there are multiple registrations for a
6 particular work, which happens all the time.

7 And we've produced in the discovery instances where
8 an album may have been registered and the individual track may
9 have been registered, which is entirely proper and the
09:16:52 10 copyright office allows. And so he's not looked at any of
11 that. All he's done is said, okay, I'm going to scan down
12 PX 1, and I'm going to look at the -- and I'm assuming this is
13 what he's going to say: I'm looking at the SRs listed.

14 Those SRs listed there do not purport to be the
15 universe of SRs that are relevant to the registrations in the
16 case. Those were marked and identified and admitted based on
17 the plaintiffs' testimony that those are the works in suit, and
18 not with reference to the registrations. Benefit of hindsight,
19 we probably shouldn't have included the registration numbers on
09:17:34 20 there, but they -- nobody has purported that that's the entire
21 universe of registrations for those works.

22 So now he wants to do an analysis that he didn't do
23 before which doesn't look at the underlying registrations.
24 Now, if he gets up and says, I have, well, how does a forensic
25 accountant who's never looked at a copyright registration in

1 his life have any expertise to do that analysis?

2 So that's the problem with page 13. There are
3 further problems with page 21.

4 THE COURT: So --

5 MR. OPPENHEIM: I'm sorry.

6 THE COURT: What's the problem with 13? He can't add
7 up the number of sound recordings and music compositions, or he
8 can't identify which ones have one track and which ones have
9 multiple tracks?

09:18:19 10 MR. OPPENHEIM: So he's purporting to do a 1006
11 summary, I think, I think. But in order to do that, he has
12 to -- he has to know what he's summarizing, what it
13 constitutes. What he's summarizing is simply plaintiffs'
14 exhibit of the works in suit, not the registration information.

15 Plaintiffs have never contended and never admitted
16 PX 1 with respect to that issue, but that's the only thing he's
17 looking at in that exhibit. He has not looked at the
18 underlying registration, so he can't do that analysis.

19 So, yeah, we have no -- sorry, to be clear, we have
09:18:58 20 no objection to the top of this. That's not a problem. Our
21 only objection is the reference on the bottom of the page,
22 which refers to 664 SRs with one track -- and by the way, the
23 word "track" doesn't appear anyone on PX 1 -- and 789 SRs with
24 multiple tracks.

25 THE COURT: Does he equate tracks with songs? It

1 seems in -- there's a reference in his opening report where he
2 says "tracks" and then has "(songs)."

3 MR. OPPENHEIM: I presume that's what he's doing.

4 THE COURT: Right.

5 MR. OPPENHEIM: But again, Your Honor, what he's
6 purporting to do is do an analysis of PX 1. While
7 Mr. Tregillis may have many talents and expertises, copyright
8 registrations is not one of them, and doing this -- this is not
9 how defendants get to do this. If defendants wanted to put an
09:19:55 10 expert up on this, they could have. If defendants wanted to
11 cross-examine plaintiffs' witnesses, they could have. Using
12 Mr. Tregillis at the last minute when it's not in his expert
13 report, it wasn't part of his deposition, is outside the
14 bounds.

15 And what -- one of the things that Your Honor has
16 said -- one of the things that Your Honor has said is that
17 these trials are not supposed to be about ambush, which is why
18 you asked that we exchange exhibits in advance in binders, but
19 that's exactly what this is. Plaintiffs are supposed to
09:20:28 20 have --

21 THE COURT: Okay. Let's go to 21, 22, 23.

22 MR. OPPENHEIM: So with respect to 21, the question
23 is which version of 21 we should look at, the first version or
24 the second version. So the first version, Your Honor, I
25 believe --

1 THE COURT: I just have what you passed up to me or
2 somebody passed up to me yesterday.

3 MR. OPPENHEIM: Yesterday. So that, I believe, on
4 the bottom of the page, on page 21, lists 4,324 --

5 THE COURT: Right.

6 MR. OPPENHEIM: -- only SR, right?

7 And the new version that we were handed -- given at
8 9:30 last night says 4,322. And then on the SR and MC, the
9 first version said 2,409, and this version says -- the new
09:21:18 10 version says 2,412. And then the final, and then the final
11 number about only musical composition, the first version said
12 871. This version says 874.

13 I don't know, Your Honor, how anything could be more
14 evident that this analysis is still going on after, you know,
15 as of 9:30 last night.

16 THE COURT: What, what do you object to in 21, 22,
17 and 23? Everything below the number of recordings and
18 compositions?

19 MR. OPPENHEIM: Yes, Your Honor.

09:21:52 20 THE COURT: And is any of this in his report, any of
21 his reports? And does he do the analysis of 32 percent of the
22 tracks are both SR and MC and -- I mean, Mr. Buchanan said
23 yesterday it's just doing the math, and evidently you're
24 telling me that this exhibit to his report, which contains
25 2,222 sound recordings and 1,195 isn't the exhibit, that he

1 would have to have gone back to PX 1 and 2; is that right?

2 MR. OPPENHEIM: Yeah, I don't know where he did this.
3 The sole reference that Cox has given us for this in his expert
4 report is the same Schedule 6, which doesn't do this. So I
5 have no idea where this comes from, you know.

6 THE COURT: Did he ever -- you know, was there any
7 evidence that he had analyzed a proper royalty rate for those
8 works which contained both an SR and an MC?

9 MR. OPPENHEIM: As I understand it, his royalty
09:23:12 10 analysis just presumed that the works were in the case, and he
11 just, he just accepted all of them for purposes of his royalty
12 analysis. That's now changing because he's, he's now changed
13 his analysis, because his initial analysis was I'm just going
14 to accept that everything is in and do my analysis.

15 THE COURT: All right.

16 MR. OPPENHEIM: There are other flaws with that, but
17 leave that for cross-examination. But this, there's nothing
18 about this in his report.

19 And just so Your Honor doesn't think that we're done,
09:23:44 20 this morning we got handed two entirely new slides, which we've
21 never seen before, which purport to summarize this even
22 further. I apologize -- oh, here we go.

23 So these slides aren't numbered. I don't know if
24 counsel for Cox has a copy for the judge.

25 I'll just say while you're turning to the last two

1 pages, Your Honor, the purpose of our pushing Mr. Tregillis
2 until today was not to give Cox an opportunity to change the
3 analysis and do more analysis. The purpose was to give
4 plaintiffs an opportunity to take a look at what they had
5 already said they had done.

6 So these two new slides, you know, what I think
7 they're purporting to do is just they're going to say it's just
8 arithmetic, but those numbers, when you look at the first of
9 the two last -- I guess the second-to-the-last slide, which
09:24:57 10 starts with total number of works in suit, Your Honor, so they
11 start with 10,016.

12 Everybody in this courtroom by now knows it's 10,017,
13 so I have no idea where the 16 comes from. Now, maybe they
14 say, oh, it was another math error, but just to our point.

15 And then the 2,408 number, which is the number of SRs
16 for which the PAs are in suit, that's not the same number
17 that's on slide 21. Slide 21 has 2,412. So I don't know where
18 2,408 comes from. That's new.

19 When you go into the last slide, again, they're going
09:25:40 20 to say, well, this is just math, but, but this purports -- I
21 mean, this reads like adjusting for compilations. Where is the
22 word "compilations" in anything he looked at?

23 There's nothing he looked at that talks about
24 compilations, as far as I can tell, unless they're going to get
25 up and say he's now reviewed all the registrations, and I come

1 back to the same point. He has no expertise to have done that,
2 and he didn't do it, and it's not in his report. So --

3 THE COURT: Okay. Got it.

4 MR. OPPENHEIM: -- I think there are serious problems
5 here, Your Honor.

6 THE COURT: All right. Thank you.

7 MR. OPPENHEIM: One more minute. Sorry, Your Honor.

8 I think last but not least, apart from this all being
9 new and the plaintiffs not having an opportunity to examine it
09:26:31 10 and that there's no real appropriate opinion here, the jury is
11 going to just be horribly confused by all of this. It has not
12 been anywhere in the case to date, and on literally the last
13 day of trial, to try to throw this in, it just -- it reeks of
14 trying to sabotage the case.

15 THE COURT: All right. Thank you.

16 MR. BUCHANAN: I didn't really consider that these
17 computations were sabotage, but in any event, Your Honor, with
18 regard to the copyright registrations, we can start there, the
19 Court admitted those yesterday, subject to them reviewing them.

09:27:24 20 And just so the Court knows, they know what the
21 copyright registrations are. They are referenced in -- with
22 regard to the -- they're referenced in the complaint, and
23 they're also part of their summary judgment motion. There's
24 six affidavits, one from each corporate representative,
25 attesting to all those. They're all referenced.

1 THE COURT: But they're not the same registrations,
2 right? This is a much larger set. Some are relevant, some are
3 irrelevant, and nobody's evidently gone through them, and
4 they've never been analyzed, and they can't be reviewed by the
5 jury.

6 What, what is the value, what's the relevance for
7 putting these registrations in?

8 MR. BUCHANAN: Well, first of all, just so -- we gave
9 them the list that we're talking about over the weekend, and we
09:28:17 10 discussed it. So they can easily determine, you know, which
11 ones they don't want and which ones they do. Obviously, the
12 copyright registrations is a jurisdictional issue. They can't
13 bring the case. They then used those copyright registrations
14 to get summary judgment.

15 THE COURT: Right.

16 MR. BUCHANAN: We listed the sound recordings
17 registrations as an exhibit, and we had a savings clause as to
18 the others. We also had a clause that said -- actually we
19 identified all pleadings in the case as potential -- as
09:28:46 20 exhibits.

21 So in contrast to what plaintiffs' counsel said, we
22 identified the sound recordings as exhibits, we saved the rest,
23 and we also identified the pleadings, and all this was attached
24 to the pleadings.

25 And it's relevant. It goes to the statutory damages

1 issue, the 504 issue, and it goes to the whole, you know, their
2 case. This is, in essence, their case.

3 They used them to get summary judgment, so they --
4 and the Court basically admitted them at that point.

5 THE COURT: Yeah, my question was I didn't use 7,200.
6 They identified the fact they had registrations for X number of
7 works and -- but I'm trying to figure out what is the relevance
8 of the --

9 MR. BUCHANAN: Well, the idea is it's not an exact
09:29:32 10 science, and, in fact, if there's more in there, it's not
11 impacting their case. It's just creating a record.

12 THE COURT: What are you going to do with this, or is
13 this just putting it in in case you need it down the road?

14 MR. BUCHANAN: Yes. Sure.

15 THE COURT: Okay. So this isn't subject to
16 Tregillis's testimony, or it's not going to be part of your
17 defense in closing argument to ask the jury to look at this --
18 these exhibits.

19 MR. BUCHANAN: We're not going to point to the,
09:30:00 20 the -- we're not going to play the, the hard drive or, you
21 know, it's just -- it's important for the record that we have
22 this in there for our case, and that's why we want it in. We
23 think it should be in.

24 We're not going to make use -- there's no surprise
25 here. I mean, we asked them to stipulate to this a long time

1 ago. So there's been discussions forever about these exhibits,
2 and they've used them to their advantage to get summary
3 judgment.

4 So we think, you know, if they're out of the case,
5 then we should remove them from the summary judgment, and then
6 we don't have proof of ownership.

7 THE COURT: Okay. All right. The registrations will
8 be received.

9 MR. OPPENHEIM: Your Honor, may I just quickly
09:30:36 10 respond to that one point? I understand where you're going,
11 Your Honor.

12 THE COURT: Go ahead.

13 MR. BUCHANAN: Judge --

14 THE COURT: Hold on. Let him finish this topic.
15 Go ahead, Mr. Oppenheim.

16 MR. OPPENHEIM: So first of all, the idea that, that
17 the defendants can tell the plaintiffs over the weekend, here
18 are 72 exhibits, you have to go figure out which ones should be
19 in and which ones should be out, is ludicrous. And it's not a
09:31:01 20 standing issue.

21 THE COURT: All right. I'm done.

22 MR. OPPENHEIM: One last comment on this? To the
23 extent that all they're trying to do with them is preserve
24 issues on appeal, they don't need them because the grant of the
25 summary judgment on ownership preserves that issue in its

1 entirety for them.

2 THE COURT: Well, I mean, if they argue that there
3 were no registrations and I made an error, that there were
4 registrations for this song or that song, I'm not sure that
5 that's preserved, but is it not relevant for that purpose?

6 MR. OPPENHEIM: I, I would think that -- so a denial
7 of summary judgment is not preserved, but the grant of summary
8 judgment is always preserved.

9 THE COURT: All right.

09:31:43 10 MR. OPPENHEIM: And so they can always attack that
11 decision on -- not only on appeal but posttrial. So, so --

12 THE COURT: And are the registrations relevant to
13 that?

14 MR. OPPENHEIM: The registrations were submitted for
15 that. Your Honor had findings on that. And we have no dispute
16 with that summary judgment decision and everything under that
17 summary judgment decision being something that the defendants
18 can rely on for purposes of posttrial motions and for appeal,
19 but that's very different than them being able to use it -- use
09:32:13 20 them with Mr. Tregillis to argue about them in closing.

21 THE COURT: They just said they're not using it.
22 It's merely for record purposes. That's, that's what I heard
23 Mr. Buchanan just say.

24 MR. OPPENHEIM: Yeah. My, my fear is, Your Honor, is
25 I don't want later, whether it be before Your Honor, who will

1 know the record, or the Fourth Circuit, there to be some
2 argument, well, look at these 7,200. They don't necessarily
3 include everything. And -- because we haven't had an
4 opportunity to go through them.

5 To the extent that they need to preserve issues
6 posttrial or appeal, the summary judgment decision, Your Honor,
7 does that. So I don't think we need to admit them for that
8 purpose.

9 THE COURT: All right. So I'm going to admit them
09:32:56 10 provisionally, and they're not going to be used in any further
11 testimony during this trial. I'll give Sony an opportunity to
12 actually look at what's in there and file any supplemental
13 pleading that they think is appropriate.

14 But I think they're relevant. We looked at a portion
15 of them, I'm not sure which ones, and in determining the
16 summary judgment, they aren't -- you know, that issue's been
17 resolved. It's not a jury issue, but it's not irrelevant, and
18 so that's my ruling.

19 All right. Mr. Buchanan?

09:33:47 20 MR. BUCHANAN: On the, on the slides --

21 THE COURT: Yeah. Go ahead.

22 MR. BUCHANAN: I'm sorry. Do you need to address
23 that?

24 THE COURT: Well, what exhibits are we talking about
25 now, 612 through 648? Is that -- yeah, the DX 3758 is no

1 longer in?

2 MR. BUCHANAN: PX 612 through PX 8478.

3 THE COURT: 8478, okay. And they're all -- they're
4 all digital?

5 MR. BUCHANAN: Yes, Your Honor.

6 MR. OPPENHEIM: I don't believe they've been marked,
7 Your Honor.

8 THE COURT: Okay.

9 MR. BUCHANAN: We'll confirm that, Your Honor.

09:34:36 10 THE COURT: Okay.

11 MR. BUCHANAN: On the slides, I mean, we went over
12 this yesterday, and we heard the same argument.

13 THE COURT: Yeah, but I had a chance to look at the
14 Tregillis reports and the deposition, and where is any of this?
15 Is any of it --

16 MR. BUCHANAN: So actually, I passed you -- I gave
17 you those passages from the reports.

18 THE COURT: And it's not there.

19 MR. BUCHANAN: Well, if you looked at -- if you
09:35:02 20 looked at those charts, he calculates those that are musical
21 composition, those that are sound recording, and those that
22 are, you know, separate and distinct. So in some cases, you
23 have both a sound recording and musical composition. Sometimes
24 you have a sound recording. Sometimes you have a musical
25 composition.

1 And in those pages I gave you, Your Honor, that's
2 what -- that's what he was doing, and if you looked at the
3 columns, you could see how he did that, and those were examples
4 that he went through, and that's all he's doing here.

5 I mean, the, the plaintiffs are making this out to be
6 some, you know, rocket science, and it's just simply we know
7 for a fact how many sound recordings we have, we know how many
8 musical compositions, and sometimes we have both and sometimes
9 we have them individually, and he's pricing them. So one is 10
09:35:57 10 cents, one is 90 cents. Okay?

11 So the pricing for these, according to the
12 plaintiffs' own testimony, you know, when they look at these to
13 price them, like, from iTunes -- and that's what he does. If
14 you see in his demonstratives, he says, it's 10 cents here, 90
15 cents here, and I've given a dollar for everything. So this
16 notion that he didn't do this in his report, he does.

17 And by the way, the Schedule 6, he updated it all
18 along. So they referred to the initial Schedule 6. He's
19 updated that.

09:36:31 20 THE COURT: Well, that's -- the only one I have is
21 the one with the 2,222 -- but maybe I didn't look at the right
22 one, either. What is -- those figures in that exhibit conform,
23 some- --

24 MR. BUCHANAN: There's no dispute that these are
25 accurate. I mean, in other words, they're not saying, look,

1 these are inaccurate.

2 THE COURT: The numbers are accurate.

3 MR. BUCHANAN: Yeah. I mean -- and the adjustments
4 that were made last night are like 1, 2, 1, 2, because we
5 fly-spec'd it last night, and we found that there was an
6 overlap, and there actually was overcounting by the plaintiffs
7 by one.

8 THE COURT: Where in -- you know, I read the
9 supplemental rebuttal report, and then I looked at your nine,
09:37:16 10 ten, eleven pages of them and the rest of the rebuttal report.
11 What I don't see is any reference to identifying the tracks
12 which are both -- or works that are both SRs and MCs.

13 MR. BUCHANAN: Sure.

14 THE COURT: And any analysis he did on how to price
15 those. Right?

16 MR. BUCHANAN: Right. So I -- as I mentioned, Your
17 Honor, I -- the pages I gave you, which I think were in the
18 reply report, maybe in the rebuttal report, he actually does
19 those computations.

20 THE COURT: But what --

21 MR. BUCHANAN: And it's all part of his analysis.

22 THE COURT: What paragraph?

23 MR. BUCHANAN: Okay. So if you look at paragraphs
24 30, 31, 32 --

25 MR. OPPENHEIM: I'm sorry, which report are we on?

1 MR. BUCHANAN: We're looking at the rebuttal report.

2 THE COURT: Supplemental rebuttal report, May 15,
3 2019.

4 MR. BUCHANAN: Right. So in these paragraphs, 30,
5 31, 32, 33, you can see what he's doing, and while he's not
6 summing them up, he's going through the analysis, and it's all
7 part of his computation. So he's showing, here is a list and
8 here's ones that have a musical composition, a sound recording,
9 here's ones that don't, and he goes through that. And they
09:39:01 10 never asked him any questions about that. Had they questioned
11 him in his deposition, he would explain what that was.

12 So it's all part of it, of his -- ultimately his
13 computation in this case, his calculations in terms of the
14 amount of alleged harm suffered by the plaintiffs.

15 And I would add that Professor McCabe did the same
16 thing. He broke it out the same way. He did it musical
17 compositions, sound recordings, computations individually, and
18 he's rebutting him.

19 THE COURT: Okay.

09:39:32 20 MR. BUCHANAN: So these numbers that they're
21 complaining about, that they're being shocked about, I mean,
22 they are factual numbers, and they have -- it's their data.

23 THE COURT: Okay. All right. Thank you.

24 MR. OPPENHEIM: And I'm looking at the paragraphs I
25 think we were just directed to, Your Honor.

1 THE COURT: Well, they identify -- beginning back on
2 28, where it's an SR plaintiff and then MC plaintiff and SR 1
3 and MC 1, I'm not sure what those figures -- so he does
4 identify works which contain both an SR and an MC, right, in 29
5 and --

6 MR. OPPENHEIM: There is one individual example or
7 two individual examples --

8 THE COURT: 30, 34.

9 MR. OPPENHEIM: -- and now they want to claim that
09:40:58 10 because he referenced that in the context of a discussion about
11 notices, that now because he references a couple of examples,
12 that he gets to put in something that he did no analysis for?
13 Yesterday, they were saying, look at Schedule 6.

14 We looked at Schedule 6. It's not what it is.

15 And now they're saying, oh, no, no, no. Let's try
16 this.

17 Your Honor, this is exactly what isn't supposed to
18 happen. You've been -- you've restricted the plaintiffs to
19 presenting their experts, constrained by the reports and their
09:41:32 20 testimony. The rules should apply equally. It's -- this
21 analysis is not here.

22 And the fact that it's an ever-moving target of
23 numbers, I mean, Mr. Buchanan said, you know: We fly-spec'd it
24 last night.

25 That analysis was not done at the time of his report.

1 That's the question, was the analysis done at the time of his
2 report, and the answer is no.

3 THE COURT: All right. All right. The motion to
4 preclude the exhibits which contain the lower portions of 13
5 and 21, 22, 23, 26, and the last two, the motion is granted.
6 Those will be amended -- or not presented. I find that the --
7 in going over the reports, and in particular, the pages that
8 defendants have pointed to, that the analysis was not done.
9 There has been no notice that Mr. Tregillis was going to
09:42:35 10 testify about those matters.

11 This is clearly outside of the report, the summaries
12 that he gave of what his testimony was going to be, and
13 although they're not, as Mr. Buchanan pointed out, the most
14 resounding modifications, they are modifications, and they do
15 change the dynamics of his report, and that's -- it's
16 impermissible to do that this late in the -- on the last day of
17 trial. So the motion is granted to just -- those will be --
18 exhibits will either be redacted or they won't be used.

19 All right. What else do we have this morning?

09:43:26 20 MR. OPPENHEIM: I don't think anything else at the
21 moment, Your Honor.

22 THE COURT: Okay. All right. What -- does that --
23 who is -- Tregillis is the next witness? Is that --

24 MR. ELKIN: No, Your Honor. We're calling
25 Mr. Mencher.

1 THE COURT: Okay. All right. Are we ready for our
2 jury then?

3 MR. ELKIN: Yes, Your Honor.

4 THE COURT: All right. Joe, let's get our jury,
5 please.

6 THE COURT SECURITY OFFICER: Yes, sir.

7 NOTE: At this point, the jury returns to the
8 courtroom; whereupon, the case continues as follows:

9 JURY IN

09:44:44 10 THE COURT: All right. Good morning, ladies and --
11 please have a seat, everyone. Sorry again for the delay.
12 Hopefully you were comfortable.

13 Thank you for coming in on time, and please give me
14 that nod of heads that you didn't do any research or
15 investigation or talk to anybody.

16 NOTE: All jurors nodding heads.

17 THE COURT: Thank you, sir. Thank you-all.
18 All right. Next witness?

19 MR. ELKIN: Thank you, Your Honor. The defendants
09:45:10 20 call Sanford Mencher.

21 THE COURT: All right.

22 SANFORD MENCHER, DEFENDANTS' WITNESS, SWORN

23 MR. ELKIN: May I inquire?

24 THE COURT: Yes. Good morning, sir.

25 Please proceed, Mr. Elkin.

1 MR. ELKIN: Thank you, Your Honor.

2 DIRECT EXAMINATION

3 BY MR. ELKIN:

4 Q. Would you please state your full name for the record.

5 A. Sanford Mencher.

6 Q. And good morning, Mr. Mencher. By whom are you employed?

7 A. Cox Communications.

8 Q. And how long have you worked at Cox?

9 A. I've been at Cox a little over 24 years.

09:45:57 10 Q. And what is your current position?

11 A. I'm currently vice president of finance and accounting.

12 Q. Okay. Tell us a little bit about the positions you've
13 held over the past 24 years and your duties and
14 responsibilities, as briefly as you can.

15 A. So I started with Cox in 1995 as a senior financial
16 analyst. Over the next several years, I took on roles as
17 manager of financial analysis, director of business planning.

18 In 2001, I transferred down to our local market in
19 northwest Florida called the Gulf Coast, as director of
09:46:43 20 business operations, which is essentially the lead finance role
21 for the local market. While I was down there, I was promoted
22 to vice president of business operations, and that role
23 essentially oversaw finance, accounting, collections, IT, and
24 warehousing for the local market.

25 In 2005, I had the opportunity to transfer back to

1 Atlanta with Cox into a role called executive director of
2 financial planning and analysis.

3 In 2008, I was promoted to vice president of
4 financial planning and analysis, and then in early 2013, took
5 on my current role as vice president of finance and accounting.

6 Q. Thank you for that.

7 Given the 24 years you've worked in financial
8 positions with Cox, how familiar are you with the financial
9 workings at Cox?

09:47:45 10 A. I would say very familiar.

11 Q. And what are your current duties and responsibilities as
12 vice president of finance and accounting?

13 A. Well, it really boils down to four major, major
14 responsibilities or key responsibilities. No. 1, I have the
15 responsibility for the integrity and accuracy of our accounting
16 and our financial statements;

17 No. 2, I oversee the governance over our financial
18 statements internal controls to ensure the accuracy of our
19 accounting;

09:48:22 20 No. 3, I lead our financial planning process, which
21 includes forecasting, budgeting, and long-range financial
22 planning; and

23 No. 4, my team also has responsibility for doing
24 financial analysis on the overall corporate or company
25 performance.

1 Q. Thank you. Let's talk about Cox's business. Are you
2 familiar with the Cox family of companies?

3 A. I am.

4 Q. What does Cox do?

5 A. So Cox Enterprises is a family-owned business, founded
6 over 120 years ago by Governor Cox when he purchased the Dayton
7 Evening News, a newspaper in 19- -- excuse me, 1898. The
8 company has operated for the next 120 years, really grounded in
9 the principles of a commitment to our customers, a commitment
09:49:22 10 to our employees, and a commitment to the communities in which
11 we serve.

12 Over those 120 years, we have built a business that
13 includes Cox Communications as well as two other businesses,
14 Cox Automotive and Cox Media Group, to the point now where Cox
15 Enterprises is in its fourth generation of family leadership,
16 with over 55,000 employees.

17 Q. Thank you for that.

18 As you know, this case relates to Cox's internet
19 product. Can you take the jury through how Cox developed its
09:50:02 20 internet product?

21 A. Well, like I said, I started with the company in 1995, and
22 we were already moving down the path of what were then new
23 services, which was high-speed internet over cable as well as,
24 believe it or not, telephone services over cable as well.

25 We launched our high-speed internet product in 1996,

1 and really it has been really a bellwether product over the
2 last 20-plus years. We continue to invest. We continue to
3 invest in our network to increase speeds to make it more
4 reliable. We've probably invested upwards of \$15 billion over
5 the last ten years in an effort to continue to provide our
6 customers with the speeds and the reliability for the internet
7 product that they want.

8 Q. Do those investments continue today?

9 A. Absolutely.

09:51:05 10 Q. Can you think of any community-based investments Cox has
11 made in its internet product?

12 A. Well, several years ago, in an effort -- you know, we
13 talked about servicing the communities. Several years ago, we
14 launched our Connect2Compete internet product, which is really
15 a \$10-a-month high-speed internet service geared towards
16 low-income families in an effort to really bridge what I would
17 say the digital divide, right, to give low-income families the
18 opportunity and an affordable way to use the internet to help
19 make their lives better, to participate in the growth of, I'll
09:51:49 20 just say, the internet boom. And over the years, that has
21 proved to be a very successful investment.

22 Q. Do you know whether Cox has different tiers of its
23 internet service?

24 A. Sure. Other than Connect2Compete, we have six tiers of
25 service which range -- we call them Starter, Essential,

1 Preferred, Premier, Ultimate, and the most recent one is
2 Gigablast.

3 Q. And what are the characteristics of each of the tiers?
4 What distinguishes one from the next?

5 A. Primarily speed, all right, download and upload speeds,
6 obviously, a Starter being at the low end and Gigablast being at
7 the high end of service. So with each one of those speeds
8 is -- really enables different capabilities for how people may
9 want to use the internet.

09:52:51 10 Q. And do you know whether Cox's fees from its customers
11 depend on what type of websites they visit?

12 A. I do know, and they don't depend on websites. It's not a
13 factor in pricing.

14 Q. Do you know whether Cox charges more for using certain
15 types of programs?

16 A. We do not.

17 Q. Now, to your knowledge, does Cox make more money if
18 customers are using their service for, say, copyright
19 infringement?

09:53:20 20 A. No, we don't.

21 Q. Why not?

22 A. Well, the service agreement then, you know, when a
23 customer signs up for service, they are choosing what is the
24 level of service they want, what tier of internet service do
25 they want to utilize. So how much they pay is based on what

1 speeds they desire.

2 We give them six different tier options to really
3 meet them where they are. So depending on how a customer uses
4 the internet, depending on their financial situation, they have
5 the option of choosing do I want the highest end speed or the
6 lower end speed, and, and that is kind of, I'll say, a part of
7 their service, regardless of what they do with the internet,
8 what they use on the internet, and, and how they consume data
9 on the internet.

09:54:15 10 Q. Have you ever heard of the term "data allowance"?

11 A. I have.

12 Q. What is data allowance?

13 A. Data allowance is essentially kind of a guideline on what
14 is the amount of data a customer is allowed to consume given
15 the level of tier of service that they have signed up for.

16 Q. So during the 2013 to 2014 time frame, what happened if
17 customers went above their data allowance?

18 A. Really, other than receiving some e-mails communicating
19 that they've gone above their allowance, nothing.

09:55:01 20 Q. Do you know whether customers were terminated by Cox for
21 going over their data allowance during the 2013-2014 time
22 frame?

23 A. No, they were not.

24 Q. To what extent is Cox's business built around promoting
25 copyright infringement?

1 A. I would say it's, it's absolutely not built around
2 promoting copyright infringement. I would go so far as to say
3 copyright infringement, other than the fact that it's illegal,
4 goes 180 degrees the opposite of the values of our business.

5 Q. Does it affect your business in other respects?

6 A. Yeah. Well, if you really think about the concept of
7 copyright infringement and illegally downloading music or
8 videos, movies, we have a video business. We've invested a lot
9 of money over the years in building a Video on Demand platform,
09:56:06 10 a Pay Per View platform.

11 We sell video. To the extent that copyright
12 infringement allows customers or allows people to get that
13 stuff for free, it actually competes with our core video
14 product itself.

15 Q. Do you know whether Cox wants to earn revenue from
16 subscribers who are using the internet to commit infringement?

17 A. No. We've never had that conversation as the leadership.
18 We don't want to make money off people who are doing things
19 illegally.

09:56:39 20 Q. Well, doesn't it matter to Cox if they lose customers
21 because they're terminated for infringement?

22 A. You know, we're a big business. We're a \$10 billion
23 business in the time frame you're talking about, and we'd just
24 as soon, you know, terminate a customer and really then worry
25 about it from a how does it impact our brand and how we view

1 ourselves and the values of our business.

2 Q. I'm going to focus the next few questions about when Cox
3 actually terminates customers. What are the expenses
4 associated when Cox actually does terminate a customer?

5 A. Well, anytime we disconnect a customer, there's really two
6 things that go into it. No. 1 is typically if a customer
7 calls, we'll answer the phone, and we'll process the
8 disconnect.

9 No. 2, we'll oftentimes, and usually I'll say, send a
09:57:38 10 field technician to the house itself and disconnect services at
11 the premise.

12 Q. Do you know whether Cox builds in any variance within its
13 projected budget for subscribers leaving?

14 A. Of course we do. So we're, we're a high-transaction
15 business, right? We probably connect upwards of 1.8 million
16 customers every single year, and we disconnect close to 1.8
17 million customers every year.

18 So part of my role as the leader of financial
19 planning is to ensure that we are budgeting for those millions
09:58:15 20 and millions of transactions in our plan.

21 Q. By the way, you just made a reference earlier to the steps
22 that it takes for Cox to terminate a customer. What does all
23 that cost on a per customer basis?

24 A. It's probably no more than 20 or 30 dollars to disconnect
25 a customer.

2723

1 Q. Now, turning to termination for nonpayment, you do that,
2 right?

3 A. We do.

4 Q. If a customer stops paying for internet service, will Cox
5 terminate their account?

6 A. Yeah, eventually we'll terminate a customer that, that
7 refuses to pay for the services that we provide.

8 Q. Are you aware of the steps Cox takes before terminating an
9 account for nonpayment?

09:59:03 10 A. I am.

11 Q. I'm told that you actually have a binder by you. Have you
12 assisted, Mr. Mencher, in the preparation of a demonstrative
13 exhibit to assist you in explaining the nonpayment process to
14 the jury?

15 A. I have.

16 Q. Now, please turn to tab 1 in your binder. Is that the
17 exhibit that you assisted with preparing?

18 A. It is.

19 MR. ELKIN: Your Honor, may I publish that to the
09:59:43 20 jury?

21 THE COURT: Any objection?

22 MR. GOULD: No objection, Your Honor.

23 THE COURT: All right. It's in. Go ahead.

24 BY MR. ELKIN:

25 Q. So with reference to this demonstrative, can you take the

1 jury through the process Cox follows when terminating a
2 customer for nonpayment?

3 A. Sure. So the best way to, to walk you through it is to
4 use kind of real date examples, and in this example, it starts
5 with a customer being billed on March 1. When a customer
6 receives a bill on March 1, that bill will typically be due on
7 or about March 22, which is three weeks later. If a customer
8 has not paid as of March 22, they would be considered late or
9 past due.

10:00:36 10 On the, on the date of their next bill, which in this
11 case is April 1, it will really kick off what we would consider
12 our initial collections process. First, there would be a
13 notification included in that month's bill to let the customer
14 know that they were late, but it also kicks off a series of
15 text messages, phone calls, and/or e-mails also to notify the
16 customer that they were late and to give them the opportunity
17 to make payment for services rendered.

18 If, if that March 1 bill has still not yet been paid
19 by April 22, which is the due date of the second bill, you see
10:01:31 20 we will process what we call a soft disconnect, which is
21 essentially deprovisioning any of their services, whether they
22 be video services, internet services, or phone services, and
23 kind of turning them off electronically. The only thing that
24 is left on is 911 service if they are a phone customer.

25 After the soft disconnect, it then kicks off, kind of

1 call it the next round of collections processes: more texts,
2 more e-mails, and more phone calls; but in addition, we create
3 a work order or instructions to a field collections team, who
4 is really charged with reaching out to the customer directly
5 and oftentimes going directly to their home to really do one of
6 two things.

7 No. 1, obviously, is try and collect payment with the
8 customer itself; or if the customer is still not willing to
9 pay, getting a commitment that says, okay, we are going to
10:02:40 10 disconnect; and this way, while the field collectors are at
11 their home, we can process the disconnect, but also collect any
12 Cox-owned equipment that the customer may have on their
13 premises.

14 Q. Why does Cox have so many steps in this process before it
15 terminates a customer?

16 A. Well, we want -- I mean, the goal is to keep the customer.
17 We kind of have this agreement if you pay, we will provide
18 services, and we feel that it's important to really provide
19 more of a customer service orientation or a customer-friendly
10:03:20 20 type of way to, to really get them to pay for the services that
21 we've provided.

22 If all else fails, come May 6, we would process what
23 we call a hard disconnect, which is really terminating that
24 customer out of our billing system and doing a physical
25 disconnect of the side of the house.

1 MR. ELKIN: Thank you, James. You can take that
2 down.

3 BY MR. ELKIN:

4 Q. Mr. Mencher, please turn to tab 2 in your binder, and let
5 me know if you recognize this document.

6 A. I do.

7 MR. ELKIN: Your Honor, this has already been
8 admitted as PX 459 in connection with Dr. Lehr's examination.
9 We'd like to publish it to the jury.

10:04:03 10 THE COURT: Go ahead.

11 MR. ELKIN: Thank you.

12 BY MR. ELKIN:

13 Q. What is PX 459?

14 A. So PX 459 is what we call our residential product P&L.

15 Q. And for what purpose was this prepared?

16 A. So the residential product P&L, if you really think about
17 our business, we operate our business, right, we have oriented
18 around the customer, residential customer really being the
19 initial orientation here.

10:04:35 20 So our residential business is how we run our
21 business, but what we do at these residential product P&Ls,
22 really create a little bit of what I'll call a hypothetical
23 view of if each of our individual residential products were a
24 stand-alone business, how would certain revenues and expenses
25 really be reflected on, on a P&L.

1 So we go through a series of calculations and
2 allocations to really assign, assign our costs, expenses, and
3 revenues down to a product level, which is reflected here.
4 It's not meant to represent, I'll say, full bottom line
5 profitability. It's really more of an analysis and a report
6 around these revenues and expenses to help, to help us
7 understand the trends in the business at a product level.

8 Q. Okay. Please turn to the second page of this exhibit.
9 There may be a confusion about what the second page is, so let
10:05:44 10 me just tell you that it's headed at the top portion of what
11 you can read Res Data Product P&L. Are you with me?

12 A. I am.

13 Q. What is this page?

14 A. So this is the, the residential product P&L specific to
15 our internet or our data product.

16 Q. And to what extent was this prepared to show the bottom
17 line profits of the business?

18 A. That was not the purpose of this document. The purpose of
19 the document was really to understand what are the data
10:06:23 20 revenues and how would these expenses that are reflected here
21 really flow to the data product itself.

22 If you were really interested in looking at bottom
23 line profitability, there would be a number of additional costs
24 and expenses that you would want to include in this report, but
25 obviously, this is an internal document. That wasn't the

1 purpose of why and how it was designed, and that's why it
2 wasn't included to begin with.

3 Q. And to be clear, this pertains to Cox's residential
4 internet service?

5 A. It does.

6 Q. Please turn to tab 3 in your binder.

7 Your Honor, this is the demonstrative that was used
8 in Dr. Lehr's examination.

9 THE COURT: All right. Go ahead.

10:07:15 10 BY MR. ELKIN:

11 Q. Have you had a chance to review this document,
12 Mr. Mencher?

13 A. I have.

14 Q. What's your understanding of it?

15 A. So my understanding is the numbers on this page,
16 particularly if you -- really tie back to the numbers on the
17 residential product P&Ls that we were just looking at.

18 Q. And do you know whether the figures on this slide as it
19 relates to the high-speed internet are accurate in your view?

10:07:46 20 A. I would say no. In particular, the net profit column and
21 the margin column are overstated based on what's on this page.

22 Q. Okay. Well, let's go back to PX 459, the spreadsheet that
23 you just examined specifically with respect to page 2 that you
24 just took the jury through. With regard to that page, that
25 spreadsheet, do you have an understanding as to how this data

1 relates to Dr. Lehr's slide?

2 A. Yes. So if you focus on the 2014 actuals column, which is
3 what Dr. Lehr is referencing here, total product revenue is
4 2.8 million, which ties to Dr. Lehr's slide. However --

5 Q. Please proceed.

6 A. I was going to say if you go then in that same column and
7 go all the way down to the bottom, after operational expenses
8 and after administrative expenses, you get to a line called
9 product OCF, or OCF stands for operating cash flow, and that's
10:08:55 10 the 1.7 billion that is in Dr. Lehr's slide.

11 Q. Okay. Are there costs that are not accounted for in the
12 data that Dr. Lehr appears to have relied on?

13 MR. GOULD: Your Honor, may we approach briefly?

14 THE COURT: Yes, sir.

15 NOTE: A sidebar discussion is had between the Court
16 and counsel out of the hearing of the jury as follows:

17 AT SIDEBAR

18 THE COURT: Yes, sir.

19 MR. GOULD: It strikes me that Mr. Mencher has seen
10:09:37 20 this slide before. My understanding of the sequestration rule
21 is that Mr. Mencher shouldn't have seen this slide before as it
22 was part of Dr. Lehr's testimony that preceded his presence on
23 the stand. If I'm mistaken, Mr. Elkin will let me know, but it
24 sure feels and seems like he's discussed --

25 THE COURT: Well, what is -- what violates the

1 sequestration order if he's shown exhibits and asked whether
2 he's familiar with them?

3 MR. GOULD: This was a demonstrative slide presented
4 by our expert.

5 THE COURT: Correct.

6 MR. GOULD: This is an exhibit -- I don't believe
7 it's in evidence. I'm going by feel here, but something feels
8 off to me, and before we got too far down the road, I wanted an
9 opportunity to be heard.

10:10:30 10 MR. ELKIN: Your Honor --

11 MR. GOULD: In addition, it's a summary of Dr. Lehr's
12 testimony, and it -- with all due respect to Mr. Elkin, he's
13 working with and through this witness to explore topics that I
14 don't believe Mr. Mencher should have had access and
15 preparation for.

16 THE COURT: Okay. He's -- all right. He's a
17 director of finance at Cox, so he's familiar with numbers.
18 He's all over numbers, so let's --

19 MR. GOULD: I agree with that.

10:11:02 20 THE COURT: Go ahead, Mr. Elkin.

21 MR. ELKIN: Thank you, Your Honor. So we did not
22 give Mr. Mencher testimony of any of the witnesses, but this
23 particular slide specifically picks apart a document that he
24 prepared, and Dr. Lehr -- our contention is that those figures
25 that the jury now has were picked off of this very exhibit that

1 Mr. Mencher prepared and, frankly, testified to at the BMG
2 trial. It's completely misleading.

3 So it's -- in order to discuss this particular amount
4 without reference to what the jury has heard, we felt this was
5 the most -- least intrusive way to be able to do that. So I
6 just -- it really is about numbers. It's not about anything
7 other than that. He's basically trying to demonstrate what the
8 margin is, and it's just a -- it's a fallacious number.

9 THE COURT: All right. I'm going to allow it. Your
10:12:01 10 exception is noted. Thank you.

11 MR. GOULD: Thank you, Your Honor.

12 NOTE: The sidebar discussion is concluded;
13 whereupon, the case continues before the jury as follows:

14 BEFORE THE JURY

15 BY MR. ELKIN:

16 Q. Okay. What costs are not accounted for in the data that
17 Dr. Lehr relied on in this slide?

18 A. So specifically if you look at the column called net
19 profit, right, net profit -- almost by definition, net profit
10:12:40 20 is meant to include not just the revenues but all the expenses
21 of the business. When we referenced the product P&L, I made
22 reference to the fact that it only included certain expenses
23 and certain residential expenses on the product P&L.

24 Really it excludes four things that if I were looking
25 at net profit, I would include. No. 1 would be corporate

1 overhead costs. So obviously, we are a company that has
2 corporate overhead, and as I look at a full profit-oriented
3 P&L, I would want the residential data product to have its fair
4 share and account for its fair share of corporate costs.

5 No. 2 would be depreciation expense. So the
6 residential business and the residential internet business is
7 built on a network of assets. Depreciation expense is really
8 meant to represent the utilization of those assets. You can't
9 really get to profitability without considering the usage of
10:13:49 10 those assets through the concept of depreciation.

11 The third piece is interest expense. As a company,
12 we oftentimes borrow money in order to fund those investments
13 in our network and fund the investments in assets. There is
14 interest expense on the borrowings that are used for our
15 business.

16 And then lastly is taxes, and income taxes
17 specifically, and as you look at net profit, the consideration
18 of paying income taxes on any business that is making a profit
19 also needs to be considered.

10:14:33 20 So really those four things are really critical to
21 consider if you're thinking about net profit at a product level
22 or at a segment level.

23 Q. Do you know Cox's tax rate for the years 2013 and 2014?

24 A. Yes.

25 Q. What was it?

1 A. Our tax rate was approximately 37 percent.

2 Q. Okay. Now, how would you have arrived at a profit
3 analysis of Cox's internet business?

4 A. Well, kind of similar to how I just laid it out, I would
5 use everything that we have in the product P&L, but then I
6 would take for each of those four elements, I would make sure
7 that we were allocating or assigning a portion of those costs.
8 Typically we would either use, let's say, revenue as a percent
9 of total company revenue or customers as a percent of total
10 company customers as a way to allocate those costs.

10:15:28

11 Q. Okay. Turning from the residential customer angle, do you
12 know whether Cox has other types of customers other than
13 residential customers?

14 A. We do.

15 Q. Can you give some examples?

16 A. So when we operate our business, we really operate our
17 business in three segments. There's the residential segment,
18 which is geared towards residential consumers; there is the
19 commercial segment, which we call Cox Business, which is
20 largely oriented to small- and medium-sized businesses, tend to
21 be less than 50 employees or so, but also we have also moved a
22 little bit up market, and we have customers really oriented to
23 school systems, hospitals is a big vertical for us, and
24 governmental agencies are three of the primary verticals as we
25 think about going up market.

10:16:02

1 And then our third business is what we call Cox
2 Media, which is really the advertising sales arm of the cable
3 business.

4 Q. The profit analysis that you just discussed in your
5 testimony related to residential, is that applicable to the Cox
6 Business customer data?

7 A. No. We were looking at the residential product P&L. It
8 did not include anything related to Cox Business.

9 Q. And, Mr. Mencher, to what extent, if you know, does Cox
10:17:00 10 have a policy to permit customers to commit copyright
11 infringement in order to make a profit?

12 A. Well, I would say copyright infringement is illegal, and
13 not only do we not have a policy advocating it; it goes against
14 everything that we believe in. It goes against the values and
15 is 180 degrees against the principles upon which we operate the
16 business.

17 MR. ELKIN: Thank you.

18 Your Honor, I pass the witness.

19 THE COURT: All right. Thank you.

10:17:33 20 Cross-examination?

21 MR. GOULD: Your Honor, may we approach briefly?

22 THE COURT: Yes, sir.

23 NOTE: A sidebar discussion is had between the Court
24 and counsel out of the hearing of the jury as follows:

25 AT SIDEBAR

1 THE COURT: Yes, sir.

2 MR. GOULD: I think Mr. Mencher quite squarely opened
3 the door to performance evaluations and Mr. Zabek discussing
4 that notion that his performance and values are consistent and
5 in line with Cox's corporate ethics and values. He testified
6 at length about what Cox's values are and how this kind of
7 behavior in copyright infringement are clearly contrary to
8 them.

9 We think the record can demonstrate with those
10:18:35 10 performance evaluations that when the jury sees that language
11 from Cox's managers and directors, patting Mr. Zabek on the
12 back, in particular due to his values, that that will contrast
13 greatly with Mr. Mencher's testimony. And it's an important
14 piece of information for the jury to consider, particularly as
15 we get this close to a verdict, and the jury's going to be
16 asked to decide what it is that Cox is all about.

17 THE COURT: Well, why do you -- he did talk about the
18 culture at Cox, but you've got all the e-mails in evidence
19 already that you can use if you choose to impeach him on that.
10:19:14 20 Why do you need performance evaluations?

21 MR. GOULD: I think it's the clearest statement that
22 Cox as a company, Cox the defendant needs to be held to account
23 here. The jury could be left with the impression that
24 Mr. Zabek and Mr. Sikes were rogue employees who were doing
25 their own thing without the endorsement or knowledge of the

1 broader leadership.

2 Mr. Carothers testified that, you know, he knew
3 Zabek, and he wasn't surprised when he said those kinds of
4 things, but this is a little bit different. This goes further.

5 Mr. Mencher is leadership, and he's testified about
6 the ethics and values of leadership and how these types of
7 allegations and behavior that we're discussing here are quite
8 contrary to it.

9 THE COURT: Mr. Elkin?

10:20:07 10 MR. ELKIN: Your Honor, first of all, I don't even
11 know whether Mr. Mencher even knows about any sort of
12 evaluation, but putting that to the side for a moment, I think
13 Your Honor's decision with regard to the performance evaluation
14 hinged on other issues related to that.

15 THE COURT: Yeah.

16 MR. ELKIN: But beyond that, Mr. Gould took
17 Mr. Mencher through e-mails at his deposition related to Zabek
18 and Sikes. He's got those e-mails. He can shove them in his
19 face and basically say, this is what you're talking about.

10:20:38 20 So he's got all of that ammunition already, and he's
21 done it in the past, and I don't -- I'm sure he was looking for
22 an opportunity to get -- to try to get this into the case, but
23 it's not -- something that I think is more due to circumstances
24 and not something I think Your Honor laid out in the Court's
25 decision.

1 MR. GOULD: I'm happy to reiterate.

2 THE COURT: No. I'm not going to let you get into
3 performance evaluations. I mean, the issue of the performance
4 evaluation is limited to whether Cox was going to say that
5 Zabek is a rogue and that they -- that it was his fault and
6 there was no -- as happened in BMG, and I have the
7 representation it wasn't going to happen in this case, it
8 hasn't happened in this case, and so I'm going to -- your
9 exception is noted. I'm not going to allow it.

10:21:35 10 MR. GOULD: Last word, if I might? I think,
11 respectfully, he has opened the door to it by directly --

12 THE COURT: Yeah. No, no.

13 MR. GOULD: Thank you, Your Honor.

14 THE COURT: Your exception is noted.

15 NOTE: The sidebar discussion is concluded;
16 whereupon, the case continues before the jury as follows:

17 BEFORE THE JURY

18 CROSS-EXAMINATION

19 BY MR. GOULD:

10:22:31 20 Q. Good morning, Mr. Mencher. How are you?

21 A. Good morning.

22 Q. Nice to see you again. Mr. Mencher, you said you're
23 familiar with the family of companies in the overall Cox
24 enterprise, correct?

25 A. Yes.

1 Q. You talked about a couple of portions of the Cox
2 Enterprises system, including the automotive business and the
3 media business that are part of Cox Enterprises, correct?

4 A. Yes.

5 Q. And you understand that in this case, there are two
6 defendants: Cox Communications and CoxCom, LLC?

7 A. Yes.

8 Q. And CoxCom, LLC, is a subsidiary of Cox Communications,
9 correct?

10:23:13 10 A. Yes.

11 Q. But internally, you refer to Cox Communications as the
12 whole entity, correct?

13 A. Cox Communications is the entity of Cox Communications
14 separate from Cox Enterprises, which I would consider a broader
15 entity.

16 Q. When you took -- think about CoxCom and Cox
17 Communications, you refer to it internally as Cox
18 Communications as that entity?

19 A. Yes.

10:23:36 20 Q. And that's because CoxCom and the other entities that
21 consolidate up to Cox Communications are consolidated
22 financially, correct?

23 A. Yes.

24 Q. And in your financial work for Cox, when you're doing your
25 accounting and your financial reporting and your financial

1 analysis, you look at the aggregate of those entities,
2 including CoxCom and Cox Communications, together?

3 A. Yes.

4 Q. You're familiar with the term "market share"?

5 A. I am.

6 Q. In this ISP context?

7 A. Yes.

8 Q. And that's a representation of how deeply penetrated Cox's
9 products and services are as a percentage of the total
10:24:24 10 opportunity to Cox, correct?

11 A. Yes.

12 Q. And market share is an important metric that Cox
13 considers, correct?

14 A. Yes.

15 Q. Cox wants greater market share?

16 A. Generally, yes.

17 Q. And the ability to have higher market share is directly
18 correlated to Cox's ability to have more subscribers and more
19 revenue, correct?

10:24:47 20 A. Generally, yes.

21 Q. And consistent with this, Cox wants more subscribers,
22 correct?

23 A. More subscribers is good, but at a -- it also depends on
24 what does it cost to acquire and maintain those subscribers.
25 But more subscribers generally is a good thing.

1 Q. And Cox receives a financial benefit from having a greater
2 number of subscribers, correct?

3 A. We can.

4 Q. Does Cox receive a financial benefit from having a greater
5 number of subscribers?

6 A. It depends on the subscribers. Generally, yes, but if a
7 subscriber is heavily discounted, they may cost more than what
8 they are paying us. That would not necessarily be a financial
9 benefit, but as we operate our business as a whole, we tend to
10:25:42 10 operate it taking those factors into account.

11 Q. Do you recall I asked you this question and you gave this
12 answer in your deposition, sir:

13 "Does Cox receive a financial benefit from having a
14 greater number of subscribers?

15 "Answer: Yes."

16 A. Yes.

17 Q. And likewise, Cox receives a financial benefit from having
18 a greater market share, correct?

19 A. Yes.

10:26:05 20 Q. And related, the total number of subscribers or customers
21 factors into Cox's profitability?

22 A. It does.

23 Q. And the ability to retain existing customers factors into
24 Cox's profitability?

25 A. It does.

1 Q. And we talked about -- you talked a little bit about the
2 different tiers of service. Do you recall that, the internet
3 tiers of service?

4 A. Yes.

5 Q. And generally, the higher the bandwidth and the higher the
6 speed, the higher the price for that service, correct?

7 A. Yes.

8 Q. And the different prices that Cox charges its tiers of
9 internet service factor into Cox's profitability?

10:26:47 10 A. Yes.

11 Q. And the payments received from customers that Cox retains
12 factors into Cox's profitability?

13 A. Yes. The payments we receive and the payments we don't
14 receive, for that matter, both factor into profitability.

15 Q. Does Cox collect more revenue from a customer that it
16 terminates for copyright infringement or that it retains on its
17 network?

18 A. I'm not familiar with what we terminate or don't terminate
19 for a copyright infringement. What I can say is customers that
10:27:27 20 we have, we get revenue from, and customers that we don't have,
21 we don't get revenue from.

22 Q. And that would include customers terminated for copyright
23 infringement, correct?

24 A. Again, I don't know whether we are terminating or what's
25 the process for terminating customers for copyright

1 infringement, so it's difficult for me to answer that question
2 directly.

3 Q. Are you saying you're not aware of whether Cox terminates
4 customers for copyright infringement violations?

5 A. I'm not aware -- I don't -- I'm not familiar with the
6 details of the process through which customers get terminated,
7 so it's, it's difficult for me to say.

8 Q. You're the vice president of finance and accounting. Are
9 you aware, yes or no, whether Cox terminates customers for
10:28:08 10 copyright infringement violations?

11 A. I believe we do.

12 Q. And if a customer is terminated for a copyright violation,
13 does Cox collect more revenue from that customer or a customer
14 that it keeps on its network?

15 A. Any customer that is terminated, we will no longer collect
16 revenue from.

17 Q. You talked about Cox not charging data overage fees. Did
18 I get that right?

19 A. Yes.

10:28:36 20 Q. You're talking about a particular time frame, though,
21 aren't you?

22 A. I am.

23 Q. Because starting in 2015, Cox actually began charging data
24 overage fees, correct?

25 A. I don't remember the exact date, but we do collect overage

1 fees today.

2 Q. Still do today.

3 And if we looked at the ICOMS billing data for
4 customers, we could determine whether or not they were charged
5 overage fees on any given day, correct?

6 A. Yes.

7 Q. Do you know whether any of the 57,000 customers that were
8 the notices of plaintiffs' infringement notices have been
9 subject to overage fees for bandwidth or data usage?

10:29:20 10 A. I'm not.

11 MR. ELKIN: Objection, Your Honor. A quick sidebar?
12 I think it's going to be difficult for me to explain it.

13 THE COURT: Okay. Please.

14 NOTE: A sidebar discussion is had between the Court
15 and counsel out of the hearing of the jury as follows:

16 AT SIDEBAR

17 THE COURT: So I think he testified on direct that in
18 '13-'14, there were no data overage fees charged, right? And
19 you asked him whether they've changed that policy, and so where
10:30:10 20 are we?

21 MR. ELKIN: So the question that he raised in
22 isolation is a fine question, but in the context, it's
23 misleading because if the customers in 2014 and '15 continue --
24 they have data for these same customers in ICOMS from '15 and
25 beyond. So I, I was slow to raise an objection with respect to

1 the question because -- but I think it's potentially misleading
2 if he asks that question and doesn't sort of collar it to the
3 time frame because it -- and so that's my concern, and I think
4 that to the extent he's going to follow up on that, I just
5 wanted to foreshadow that issue.

6 MR. GOULD: Plaintiffs' view and Dr. Lehr's position
7 is that it's important to consider the revenue collected from
8 the infringing customers through and after the claim period,
9 including 2015 and 2016, for which we have ICOMS billing data,
10:31:07 10 and that data clearly shows that these customers were subject
11 to data overage fees in the time frame starting in 2015,
12 when they began --

13 THE COURT: "These customers" meaning those who are
14 accused of infringement in the '13 and '14 period?

15 MR. GOULD: Correct, some of the 57,000. So the data
16 clearly shows that they do.

17 I actually don't have those ICOMS reports keyed up
18 and ready, and, frankly, I wasn't planning on going there until
19 Mr. Mencher opened the door and suggested that they don't
10:31:36 20 charge those fees.

21 THE COURT: Well, but he was asked specifically about
22 '13-'14, right? That was how I heard the question.

23 MR. GOULD: That's right. And I asked did they
24 change their policy since then and if he knows whether these
25 57,000 customers have been subject to any of those types of

1 fees since then, and he said he doesn't know.

2 It might be more compelling for the jury to actually
3 pull those out and show that they were. The way it's left,
4 they're left to imagine whether they were or not.

5 THE COURT: Well, there's -- you know, in Lehr's
6 report, in his testimony, he goes into '15 and '16 for some
7 information. I'm not sure what it was. I don't recall. Was
8 it just revenues? Was that what it was?

9 MR. GOULD: It was one of the points to demonstrate
10 Cox's economic incentives to tolerate infringement. For that,
11 he considered revenue beginning with the claim period and
12 through the period for which they provided ICOMS billing data.

13 MR. OPPENHEIM: Billings, just to be clear.

14 MR. GOULD: Billings.

15 THE COURT: Billings?

16 MR. ELKIN: But there's no reference in the
17 testimony, he's got no foundation to assume that there are any
18 data allowance charges for going over and beyond during the
19 claims period. That's why I thought the question was
10:32:51 20 misleading. That was my only point.

21 MR. GOULD: He testified that he's familiar with the
22 ICOMS data. He testified that we didn't charge these fees in
23 2013. He testified that he's aware that they started charging
24 in 2015. He's got the foundation.

25 THE COURT: All right. Are you going to put this in

1 through Lehr?

2 MR. GOULD: I think I'm done, frankly. I was going
3 to move on.

4 THE COURT: Okay. All right, move on. I'll leave it
5 at that. Thank you.

6 MR. ZEBRAK: You could have said that in the
7 beginning.

8 MR. GOULD: I should have started there.

9 THE COURT: We got there eventually, yeah.

10:33:35 10 MR. ZEBRAK: Thank you.

11 NOTE: The sidebar discussion is concluded;
12 whereupon, the case continues before the jury as follows:

13 BEFORE THE JURY

14 THE COURT: All right, proceed.

15 BY MR. GOULD:

16 Q. Mr. Mencher, I'd like to take a look at the slide that we
17 reviewed a few minutes ago that was part of Dr. Lehr's
18 testimony. I know you weren't here for that, but you've since
19 looked at this slide, correct?

10:34:19 20 A. Yes.

21 Q. And having not been here, you also wouldn't have heard
22 Dr. Lehr describe net profit in a couple of ways, and he
23 testified that -- let me ask a different question.

24 Are you aware -- you're familiar with the
25 term "operating cash flow"?

1 A. Yes.

2 Q. And at times in your work in the financial field for many
3 years, have you ever experienced people using different terms
4 to describe similar concepts?

5 A. Yes.

6 Q. Okay. And are you aware that Dr. Lehr also described the
7 net profit field as operating cash flow?

8 A. No.

9 Q. And what's listed as net profit or operating cash flow,
10:35:09 10 you don't dispute the numbers on the slide, do you?

11 A. The numbers on the slide tied to the product P&L, product
12 operating cash flow.

13 Q. And another way of thinking about operating cash flow is
14 operating profits, correct?

15 A. I would -- I think the term we typically use
16 interchangeably with operating cash flow is earnings before
17 interest, taxes, depreciation, and amortization.

18 Q. Yet another term for the same concept, right?

19 A. Yes.

10:35:40 20 Q. We've now talked about three terms that essentially mean
21 the same thing, correct?

22 A. I don't know how you're defining "operating profit," so
23 that's what I was just clarifying. Inside of Cox, we use
24 operating cash flow and earnings before interest, taxes,
25 depreciation, and amortization.

1 Q. And you understand, sir, that the numbers in Dr. Lehr's
2 slide came directly from the product P&L that your department
3 produced and provided, correct?

4 A. That is correct.

5 Q. And do you stand behind the accuracy of the financial
6 papers that you produced?

7 A. I do.

8 Q. Let's take a look -- one of things you testified, sir, is
9 that you're responsible for the integrity and accuracy of Cox
10:36:29 10 Communications' financials, correct?

11 A. Yes.

12 Q. And that would include PX 459, that dense financial
13 spreadsheet we looked at, correct?

14 A. Well, PX 459 is a financial report. When we talk about
15 the accuracy and integrity of our financial statements, in
16 particular, we are really referencing our audited financial
17 statements, which is from a Cox Communications consolidated
18 perspective.

19 There are plenty of reports and financial reports out
10:36:58 20 there that we also rely on, but I'll just say the accuracy --
21 the accuracy and the integrity of the financial statements is
22 really more geared towards our consolidated and audited
23 financial statements.

24 Q. And you would stand behind the accuracy and integrity of
25 those audited financial statements, correct?

1 A. I would.

2 Q. If you could turn to tab 6 in your binder, please?

3 And I believe this is in evidence, though someone
4 should correct me if I'm wrong. PX 443, the 2014 audited
5 financial statements.

6 The PX 443 is in evidence. This is the 2014, it
7 says, Annual Financial Supplement. You recognize this, sir, as
8 the audited financials for Cox Communications for 2014?

9 A. I do.

10:38:03 10 Q. And you worked with -- Cox worked with an auditor named
11 Deloitte to prepare these, correct?

12 A. We prepared the financials, and Deloitte reviews them.

13 Q. Deloitte reviewed and audited them?

14 A. Yes.

15 Q. And you believe these are accurate, correct?

16 A. I do.

17 Q. If we could turn to page 61 of the PDF?

18 You recognize this letter as the independent
19 auditors' report on the financials?

10:38:35 20 A. I'm sorry, what page?

21 Q. I'm sorry, it's the second-to-last page of the entire tab,
22 the Deloitte letter at the end.

23 A. Okay. Yep, yes.

24 Q. And it begins -- it's addressed to the Board of Directors
25 and Shareholders, and the shareholders, again, that's Cox

1 Enterprises, including the Cox family, correct?

2 A. Yes.

3 Q. It says: We have audited the accompanying and
4 consolidated financial statements of Cox Communications, Inc.,
5 and its subsidiaries (the "Company") (a wholly owned subsidiary
6 of Cox Enterprises, Inc.), which comprise the consolidated
7 balance sheets as of December 31, 2014, and 2013, and the
8 related consolidated statements of operations, shareholders'
9 equity, and cash flows for each of the three years in the
10:39:26 10 period ended December 31, 2014, and the related notes to the
11 consolidated financial statements.

12 You understand that basically means we looked at all
13 this stuff and we reviewed it?

14 A. Yes.

15 Q. And if you look at the next page, at the top, the auditors
16 give an opinion that the consolidated financial statements are
17 in accordance with the accounting principles generally accepted
18 in the U.S. This means Deloitte gave it a thumbs up, right?

19 A. Yes.

10:39:59 20 Q. Now, I want to turn to page 3. That was just to give us a
21 lay of the land of what we're looking at here. And -- page 3
22 of the PDF.

23 And on the page that's in front of you, it starts
24 with a management discussion and an executive overview,
25 correct?

1 A. Yes.

2 Q. And I'm -- starting on the paragraph -- actually towards
3 the bottom, if you could scroll up just a bit, Mr. Duval?

4 I'm reading here, it says: Cox's business strategy
5 is to leverage the capacity and capability of its nationwide IP
6 network to deliver an array of services to consumers and
7 businesses while creating multiple revenue streams. Cox
8 believes that its investments in the technological capabilities
9 of its nationwide IP network, the long-term advantages of
10 clustering, the competitive value of bundled services, and its
11 commitment to customer care and community service enhance its
12 ability to increase revenues in an increasingly competitive
13 environment. Cox's primary focus in today's competitive
14 landscape is on continued growth and profitability of all of
15 its businesses and product lines and effective execution of its
16 bundling strategies.

17 Do you agree with that statement, sir?

18 A. I do.

19 Q. And at this time frame, in the 2014-2013 time frame, Cox
20 was growing, correct?

21 A. Yeah, we were.

22 Q. Much of Cox's business strategy is wrapped up in the
23 bundle -- in the bundle of services provided to customers,
24 correct?

25 A. Yes.

1 Q. And that's true for both residential and business
2 customers?

3 A. Yes.

4 Q. In fact, the primary lens through which Cox looks at its
5 business is inclusive of all -- inclusive of all of the
6 products and services provided?

7 A. Yes, yes.

8 Q. And a value of a customer to Cox is not just in the
9 individual services provided, but also the number of products
10:42:41 10 and services provided and how much the customer pays for each
11 and all of those services, correct?

12 A. Yes.

13 MR. GOULD: Can we turn to page 51 of the same
14 document? 51 of the PDF. Scroll down a little bit.

15 BY MR. GOULD:

16 Q. Mr. Mencher, we're now looking at a section of the audited
17 financials labeled Shareholders' Equity. And you understand
18 this discusses the ownership interest by Cox Enterprises and
19 the Cox family, correct?

10:43:32 20 A. Yes.

21 MR. GOULD: If we can highlight the last sentence?

22 BY MR. GOULD:

23 Q. According to the 2014 audited financials, it says here on
24 the last sentence: For the years ended December 31, 2014,
25 2013, and 2012, Cox paid dividends to its shareholders of

1 \$1 billion, \$1.5 billion, and \$1.4 billion, respectively.

2 Correct?

3 A. Yes.

4 Q. And those are cash dividends paid out of -- paid out from
5 Cox Communications' free cash flow?

6 A. Yes.

7 Q. And free cash flow is essentially what's left from Cox's
8 operating cash after accounting for taxes and capital
9 investments and interest payments, correct?

10:44:18 10 A. Yes, in addition. There are some other --

11 Q. Some other things. Depreciation?

12 A. Investments.

13 Q. Investments. So the dividends come out of the free cash
14 available after Cox pays all of those things, correct?

15 A. Yes.

16 Q. So when you think of the dividend, the cash dividend, it's
17 cash paid out, what you have left over afterwards, right?

18 A. I'm not sure I understand the question.

19 Q. Well, I'll ask a better question. The cash dividend shown
10:44:52 20 here is cash that Cox was able to take out of the business as
21 it was growing in the 2012 to 2014 period, correct?

22 A. Yes.

23 Q. When Cox bills its customers -- I'm shifting gears here a
24 little, just to give you a heads-up. When Cox bills its
25 customers, it does a pretty good job collecting on the amounts

1 billed, correct?

2 A. I would say yes.

3 Q. In general, Cox collects about 98 to 99 percent of the
4 bills issued, correct?

5 A. Yes.

6 MR. GOULD: Pull up PX 365.

7 BY MR. GOULD:

8 Q. Mr. Mencher, I want to talk about disconnects for
9 nonpayment.

10:45:59 10 Page 11, please.

11 You testified about this in direct, but we didn't
12 look at the numbers. So I want to make sure we're on the same
13 page here.

14 If you could pull up just the two paragraphs,
15 including the yellow? That's fine.

16 And the jury has seen this before, so I'll move
17 quickly. You agree, sir, that Cox has reported disconnecting
18 the internet service for roughly 600,000 and change residential
19 customers, and 21,000 and change business customers, in the
10:46:31 20 years 2013 and 2014, correct?

21 A. Yes.

22 Q. And you understand, sir, that Cox has argued in this case
23 that it can't be expected to terminate internet service of
24 business customers for copyright infringement violations
25 because they might include hospitals or fire stations?

1 A. I'm unaware of any testimony in the case.

2 Q. Notwithstanding, you would agree that Cox terminated over
3 21,000 business customers in the two years, 2013 to 2014?

4 A. I haven't done the math, but that's -- it looks in the
5 general vicinity.

6 Q. And you described a process of late bills and soft
7 disconnects about nonpayment. I want to go through that in a
8 minute, but I first want to understand, was that the process
9 that's in place now or in the 2013-2014 period?

10:47:38 10 A. That is the process that is in place now, but I don't know
11 of any major changes to that process over the last few years.

12 Q. Fairly confident that it was the same process in
13 2013-2014?

14 A. I am.

15 Q. Not certain but fairly confident?

16 A. Yes.

17 Q. So I want to walk through that to make sure that I
18 understood it. There's a lot going on in that slide. The --
19 Cox sends a customer a bill, correct?

10:48:11 20 A. We do.

21 Q. And generally that bill is due in about 21 to 22 days. I
22 think your slide showed the March 1 bill was due March 22,
23 correct?

24 A. Yes.

25 Q. And if the customer hasn't paid that bill within 30 days

1 of the due date, then Cox disconnects the service, right, a
2 soft disconnect?

3 A. Yes.

4 Q. So if the bill's 30 days late -- 30 days late, turn off
5 their service, right?

6 A. Thirty days late, we deprovision their services, yes.

7 Q. From the customer's point of view, you turned off their
8 service, right?

9 A. Yes.

10:48:47 10 Q. And you called it a deprovisioning. You basically flick a
11 switch on the modem, and maybe they still get 911, but they
12 can't do their TV, their phone, their internet, other than the
13 emergency call?

14 A. That is correct.

15 Q. And if the customer still hasn't paid for another two
16 weeks, 14 days, then you do a hard disconnect, right?

17 A. Yes.

18 Q. And a hard disconnect means you really shut them off,
19 correct?

10:49:14 20 A. Yes.

21 Q. I want to pull up a slide that you showed about this for a
22 second. We have a due date, and then after 30 days, a soft
23 disconnect, and you've talked about some things here: texts
24 and phone calls and e-mails.

25 Those are all automated things, correct?

1 A. They can be.

2 Q. In fact, the phone calls typically are, like, robocalls or
3 automated phone calls, correct?

4 A. Not necessarily. We have, we have bill collections group
5 that actually makes phone calls.

6 Q. Is your understanding, sir, that the bulk of those calls
7 for collections are based on automated robocalls?

8 A. No.

9 Q. Are you, are you aware of whether or not Cox has been sued
10:50:29 10 for collections efforts by robocalls to non-Cox customers?

11 A. No.

12 Q. Okay. And after the soft disconnect, more of the same,
13 but this time you actually send some people out to knock on
14 doors, right?

15 A. Yes.

16 Q. And to collect equipment?

17 A. Yes.

18 Q. Assuming they --

19 A. Assuming that they don't pay, yes.

10:51:00 20 Q. I didn't mean to interrupt. I apologize.

21 Fairly aggressive efforts by Cox in this limited
22 period to get the money from the customers, right?

23 A. I don't know what you would consider aggressive or not
24 aggressive. That's our process.

25 Q. Do you think it's aggressive?

1 A. No.

2 Q. Phone calls, texts, e-mails, field collection agents, not
3 aggressive?

4 A. No.

5 MR. GOULD: Okay. You can pull that down. Wait one
6 second.

7 BY MR. GOULD:

8 Q. You understand, sir, that Cox has a graduated response
9 program for responding to copyright infringement complaints
10:51:55 10 pursuant to which it considers terminating the internet service
11 of customers identified in copyright infringement notices?

12 A. I've heard the term, but I'm not familiar with the details
13 of the process.

14 MR. GOULD: Let's pull up that slide.

15 BY MR. GOULD:

16 Q. There's been a lot of testimony in this case about that
17 process, and you recognize the information on the right of the
18 slide is the process for nonpayment terminations? And the
19 first step is a soft disconnect after 30 days, correct?

10:52:31 20 A. Yes.

21 Q. And the second step is hard termination after 44 days,
22 correct?

23 A. Yes.

24 Q. And at the bottom of the slide shows the number of
25 residential and business customers terminated for nonpayment in

1 the 2013-2014 time frame, correct?

2 A. Yes.

3 Q. And what we've done here on the left, sir, is showed you
4 the process by contrast for how Cox responds under its
5 graduated response program to copyright infringement notices
6 leading to -- I was going to say termination, but really
7 consideration of termination.

8 Do you recognize that?

9 A. No.

10:53:09 10 Q. And are you aware, sir, that in the same two years, Cox
11 terminated just 32 residential customers for copyright
12 infringement?

13 A. I was not.

14 Q. Now, one of the things that can happen to a customer
15 terminated for nonpayment is they might want to get back
16 online, right?

17 A. Yes.

18 Q. And for a customer who's soft disconnected, Cox will,
19 subject to a charge of a late fee and a reactivation fee, maybe
10:54:15 20 put them back online?

21 A. Yes, we will.

22 Q. And we could look at the product P&L, that spreadsheet we
23 looked at earlier, and actually see it, line items for
24 2013-2014 showing millions of dollars in reactivation fees,
25 correct?

1 A. I believe so.

2 Q. So not only is Cox terminating customers for nonpayment,
3 but then when it puts them back online, it's charging more and
4 making more, correct?

5 A. Well, we also have additional costs, so -- but we do have
6 that revenue.

7 Q. I think you said for soft termination, it's deprovisioning
8 service. Isn't that a flick of a switch?

9 A. Yeah, but we are -- I was just pointing out that we're
10:54:57 10 incurring costs along the way as part of the collection efforts
11 leading up to the soft disconnect.

12 Q. So flick a switch, some texts and e-mails, those are the
13 costs?

14 A. Well, there are people involved, but yes.

15 Q. You testified, sir, about -- I think you said leadership
16 doesn't promote allowing copyright infringement to continue
17 collecting revenue, something along those lines? Did I get
18 that right?

19 A. I don't -- I don't know.

10:55:41 20 Q. Do you recall testifying about leadership's view of making
21 termination decisions of copyright infringement customers --
22 let me start fresh.

23 MR. ELKIN: Objection.

24 BY MR. GOULD:

25 Q. Do you recall giving testimony about leadership's view of

1 keeping customers online who have been subject to copyright
2 infringement notices so that it might continue to collect
3 revenue from them?

4 A. I mean, you're talking today?

5 Q. Yeah, I thought I heard it.

6 A. Okay. I was just -- I didn't know if you were referencing
7 the deposition. So, no, I think my perspective is I don't
8 believe that we as a company want to be in the business of, of
9 doing things illegally, and we would just as soon not have a
10 customer than have an illegal customer.

10:56:41

11 Q. You understand that if -- when Cox makes a decision to
12 keep a customer online who it has knowledge of their
13 infringement activity, is making a decision to retain their
14 revenues?

15 A. Again, I don't know the process of the graduated response
16 system and the process of terminating customers, but I do agree
17 to the extent that we have a customer longer, there will be
18 more revenue.

19 MR. GOULD: Could we pull up PX 304, please?

20 BY MR. GOULD:

21 Q. Mr. Sikes, I -- excuse me -- Mr. Mencher, I believe we
22 looked at this in your deposition, and --

23 THE COURT: We don't have that being in evidence.
24 Are you going to move it now or --

25 MR. GOULD: Yes, I'd move PX 304.

1 THE COURT: All right.

2 MR. GOULD: I apologize. I thought it was in through
3 the Sikes deposition.

4 MR. ELKIN: I just have a question.

5 THE COURT: About the document?

6 MR. ELKIN: I'm not sure this was actually marked and
7 shown to the witness. There was other documents that were
8 shown. I don't know whether it was this particular one.
9 That's not my -- in terms of the document, I mean, it's a
10:58:17 10 different issue. But it's a foundation issue.

11 THE COURT: Okay.

12 MR. GOULD: I'll simplify it. We'll take a look at a
13 different document.

14 THE COURT: All right.

15 BY MR. GOULD:

16 Q. Let's look at PX 342, please, and go to the third page.

17 THE COURT: Is this in? It's in, okay.

18 MR. GOULD: Zoom in on the bottom e-mail.

19 BY MR. GOULD:

10:58:39 20 Q. Everyone's seen this e-mail quite a few times, so I'll
21 keep it brief. Do you see the second-to-last sentence: This
22 customer pays us over \$400/month, and if we terminate their
23 internet service, they will likely cancel the rest of their
24 services? Do you see that?

25 A. I do.

1 Q. You understand that Mr. Sikes was making a termination
2 decision for copyright infringement based on the ability to
3 keep that customer and keep that revenue flowing?

4 MR. ELKIN: Objection. Speculation.

5 MR. GOULD: I asked his understanding.

6 THE COURT: Yeah. I'll allow the question. Your
7 exception is noted.

8 THE WITNESS: Without talking to Mr. Sikes, I really
9 don't know what he was, what he was implying.

10:59:21 10 MR. GOULD: No further questions, Your Honor.

11 THE COURT: All right. Redirect?

12 MR. ELKIN: No redirect, Your Honor.

13 THE COURT: All right. Then may Mr. Mencher be
14 excused?

15 MR. ELKIN: (Nodding head.)

16 THE COURT: All right. Thank you, sir. You're
17 excused. Please don't discuss the testimony you've given with
18 anyone until our trial is over. All right?

19 THE WITNESS: All right.

10:59:40 20 THE COURT: All right. Have a good day. Thank you.

21 THE WITNESS: Thank you, Your Honor.

22 NOTE: The witness stood down.

23 THE COURT: All right. Let's take our mid-morning
24 break, and we'll take 15 minutes, and we'll come back with our
25 next witness. All right? You're excused. Thank you.

1 NOTE: At this point, the jury leaves the courtroom;
2 whereupon, the case continues as follows:

3 JURY OUT

4 THE COURT: All right. Anything we need to discuss
5 before we break?

6 MR. OPPENHEIM: Not from the plaintiffs' perspective.

7 MR. BUCHANAN: No, Your Honor.

8 THE COURT: Okay. All right. We're in recess.

9 NOTE: At this point, a recess is taken; at the
10 conclusion of which the case continues in the absence of the
11 jury as follow:

12 JURY OUT

13 THE COURT: Ready for our jury?

14 MR. ZEBRAK: Your Honor, one administrative issue.

15 THE COURT: Yes, sir.

16 MR. ZEBRAK: I'm sorry I have to raise with the
17 Court. But Cox won't give us an updated copy of the slide
18 deck. And when we do our cross-examination, we need to be able
19 to display it. I can't, on the ELMO, use slides with different
20 numbers, and it -- this makes no sense to me.

21 We've offered a thumb drive for them just to hand it
22 over. They refuse to do so. We would like a copy.

23 MR. BUCHANAN: So they have the original slides. And
24 we told them, we're taking out the ones that the Court said
25 either take them out completely or take out that portion that's

1 objectionable.

2 So the last two are out, and then 13, 21 -- those
3 other numbers are out. I've given them the numbers.

4 So they have a set, and they just need to turn the
5 pages, and what will be displayed will just be the ones that
6 the Court said were permissible.

7 THE COURT: Okay. Is that -- can you use those that
8 you -- you already have a set of the old ones that you can pull
9 up, or you don't?

10 MR. ZEBRAK: Yes, sir. However, they'll have
11 different slide numbers on them. It's not going to be exactly
12 the one they use.

13 This should have taken 30 seconds, and we're just
14 hoping to alleviate any confusion. I don't see the reason why
15 they won't give us a slide.

16 THE COURT: Can you do -- can you give them a copy of
17 the new ones? I mean, how hard is that?

18 MR. BUCHANAN: Well, we don't have it. We didn't
19 print them out. We didn't make the -- but what's going to be
20 displayed is what's --

21 THE COURT: I understand, I understand. The same
22 thing. Page numbers different --

23 MR. BUCHANAN: I don't know --

24 MR. ZEBRAK: And we're not looking for a printed
25 copy, Your Honor. We're just asking them to digitally move the

1 file into a thumb drive.

2 MR. BUCHANAN: All right, we'll give it --

3 THE COURT: Let's give it to them if you could.

4 MR. BUCHANAN: That was not something they ever
5 agreed to do with us. But, okay, we'll do that.

6 THE COURT: Thank you.

7 MR. ZEBRAK: Thank you, Your Honor.

8 THE COURT: All right. Joe, let's get our jury,
9 please.

10 NOTE: At this point the jury returns to the
11 courtroom; whereupon the case continues as follows:

12 JURY IN

13 THE COURT: All right. Please have a seat.

14 MR. BUCHANAN: Your Honor, we'd call Dr. Christian
15 Tregillis to the stand.

16 THE COURT: All right. Please come forward, sir.

17 NOTE: The witness is sworn.

18 THE COURT: All right. Good morning, sir.

19 Please, Mr. Buchanan, proceed.

20 CHRISTIAN D. TREGILLIS, called by counsel for the
21 defendants, first being duly sworn, testifies and states:

22 DIRECT EXAMINATION

23 BY MR. BUCHANAN:

24 Q. Sir, could you state your full name for the record, and
25 spell your last name, please.

1 A. Sure. Christian Dale Tregillis. My last name is spelled
2 T-r-e-g-i-l-l-i-s.

3 Q. And what is your occupation, sir?

4 A. Thank you. I am what is referred to as a forensic
5 financial analyst. Which means that I perform accounting,
6 financial, and economic investigations. The word "forensic"
7 means in the context of a pending or potential legal dispute.

8 So a lot of my work is in the context of legal
9 disputes, but not all of it.

10 Q. Okay. What is your educational background?

11 A. I graduated with an undergrad degree in economics from
12 Occidental College in 1989. I worked for a couple years from
13 1989 to 1991. And then I went to graduate school and got a
14 Master's in business administration from the University of
15 Chicago in finance and accounting.

16 I also have continuing education obligations for
17 professional licenses that I have, but those are the only ones
18 in school since college.

19 Q. Could you summarize your professional career for the jury
20 and the Court, please.

21 A. Sure. So after graduating in 1993, like I said, from
22 graduate school, I began working in the same field in which I
23 work today, which is, like I said, performing those accounting,
24 financial, and economic investigations.

25 I started off at what used to be called the Big Six

1 accounting firms. I worked at one called Coopers & Lybrand,
2 and then another one called Ernst & Young, and then another
3 one, Deloitte & Touche. Which is -- well, now it's gone from
4 down to six, down to four.

5 But -- so like I said, I was a partner at Deloitte &
6 Touche, and then in 2004 I left there. There were some new
7 legislation in Congress that changed the scope of what the big
8 accounting firms could do. And so, I left, and a lot of people
9 in my industry left and moved on to other places. And I have
10 continued to work, like I said, in the same capacity.

11 I've been at my current firm, which is called Hemming
12 Morse, since 2016. But like I said, doing the same work all
13 the way through since graduate school.

14 Q. Is there any particular area that you focused on in terms
15 of evaluating assets or doing forensic accounting?

16 A. Yes. Over the course of my career, I've focused pretty
17 significantly on intellectual property, but also generally in
18 the area of quantification of economic harm.

19 And so, in the course of my work, sometimes I work on
20 the plaintiff's side, sometimes on the defendant's side. It's
21 about evenly mixed, a little bit more on the plaintiff's than
22 defendant's.

23 So in the case of intellectual property cases,
24 sometime they're, like I said, in the context of disputes,
25 sometimes not. But if I'm working for a plaintiff that has

1 intellectual property rights, like I said, a little bit more of
2 those than the defendant's side.

3 But then I'm quantifying economic harm a lot of
4 times. Sometimes I work in a neutral role, so between two
5 sides that have a dispute. Like I recently worked on a matter
6 in which there was a dispute about copyright values. And so, I
7 helped the two sides work out a settlement in that case.

8 But like I said, a fair amount of intellectual
9 property work.

10 Q. Okay. About how many matters have you calculated the
11 amount of economic harm in a manner that you are retained?

12 A. Hundreds. I've testified about 120-something times. The
13 vast majority of those pertain to economic harm. Those include
14 depositions, not all of them get to trials or arbitrations. I
15 think about 50 have gotten to trials. But like I said, the
16 vast majority is the quantification of economic harm.

17 Q. Okay. And have you been retained by Winston & Strawn
18 before, my law firm?

19 A. Yes. I have been retained by Winston & Strawn folks. I
20 have also worked against Winston & Strawn folks. So been both
21 for and against.

22 Q. Do you hold any certifications with regard to your
23 profession?

24 A. Yes. I am a CPA and -- a certified public accountant.
25 And I'm also what is called certified in financial forensics.

1 We have a professional organization nationally called the
2 American Institute of CPAs, and I do work for the American
3 Institute of Certified Public Accountants. And we created a
4 certification in financial forensics, which is a specialty for
5 people that do forensic accounting investigations like I do.
6 So we launched that about ten years ago, and I have one of
7 those.

8 I'm also accredited in business valuation, which is a
9 certification for CPAs who value businesses or intellectual
10 property rights like copyrights, and trademarks, patents, and
11 trade secrets.

12 Q. Do you work --

13 A. And there's one other one called certified licensing
14 professional, which is for people that work in licensing of
15 intellectual property.

16 Q. Okay. Do you work for any other entities besides your
17 firm, Hemming Morse?

18 A. Yes. I think I mentioned a moment ago, I do work for the
19 American Institute of Certified Public Accountants, and also
20 the California Society of CPAs. That work relates to helping
21 people in my profession who do these kinds of investigations
22 understand how to do them.

23 So that means writing practice aids, or creating
24 standards, or helping educate people in how we do this kind of
25 work.

1 So, for example, last -- well, earlier this year, it
2 was the culmination of a couple years to get it together, but I
3 was the co-author of a practice aid that was used as a
4 reference guide for what we call lost profits calculations. So
5 teaching people in my profession how you quantify the amount of
6 profits that an injured party has suffered in the context of a
7 legal dispute.

8 Because that's a lot of what we do. I don't get
9 involved in the decision of whether somebody is liable or not
10 liable. I get involved in the quantification part of it,
11 quantifying the harm.

12 And so, there are a lot of people in my profession,
13 and we try to help -- for the IACPA, we help them understand
14 the best ways of doing that. And so, I've helped in writing
15 and speaking throughout my career on those kinds of issues.

16 Q. So you've used the term "intellectual property." Would
17 that include copyrights?

18 A. Yes, that's one of the four forms of intellectual
19 property: Patents, trademarks, trade secrets, and copyrights.

20 Q. And you've worked on matters assessing the value of
21 copyrights and trademarks and patents?

22 A. Yes, all of the above. Like I said, it's sometimes
23 valuing outside the context of a dispute. For example, there
24 might be a license, somebody wants to negotiate the right
25 license rate, the royalty rate. Or purchasing, we can see

1 purchase transactions. There can be reasons for financial
2 reporting. Sometimes companies want to tell you about the
3 value of the assets that they have in their financial
4 statements.

5 So there are a variety of contexts, including in
6 legal disputes.

7 Q. Mr. Tregillis, could you look at your binder at DX 259.

8 Is that your curriculum vitae or resumé.

9 A. Yes.

10 Q. Okay.

11 A. This is from my April 10 report. And this is my
12 curriculum vitae, right. It's a summary of my professional
13 experience.

14 MR. BUCHANAN: Okay. I'd move that into evidence,
15 Your Honor.

16 THE COURT: Any objection?

17 MR. ZEBRAK: No objection, Your Honor.

18 THE COURT: Received.

19 BY MR. BUCHANAN: (Continuing)

20 Q. Mr. Tregillis, you're being paid as an expert in this
21 case?

22 A. I'm not, not directly. My firm, Hemming Morse, is paid
23 for my work in this matter, that's right.

24 Q. Yeah. And what is your hourly rate?

25 A. \$490 an hour is what the firm is paid.

1 Q. Okay.

2 A. I don't get all of that, but they do.

3 Q. And how many hours have you put into your work on this
4 case?

5 A. Probably close to 200.

6 Q. Okay. And that would involve writing expert reports?

7 A. Yes. Performing analysis. There was a lot of analysis
8 that was required here. There are 10,000 copyrights in suit,
9 those all needed to be investigated. So it takes a lot of
10 analysis.

11 And then, like I said, writing reports. And there
12 has been some back and forth.

13 I also looked at the analyses of Dr. Lehr and Dr.
14 McCabe. And we looked at some of the same kinds of issues.
15 Dr. McCabe and I performed pretty similar analyses. So over
16 time we were able to figure out where there were differences,
17 or at least I was, and find some common ground.

18 But like I said, those reports reflect my analyses of
19 my opinions, including considering the opinions of Dr. Lehr and
20 Dr. McCabe.

21 Q. And then you were deposed by the plaintiffs in this case
22 as well?

23 A. Yes, that's right, I think in June or July.

24 Q. Okay. And then you prepared for your testimony here
25 today?

1 A. Correct.

2 Q. Okay. And the amount that you're being paid is not
3 affecting your views in this case or the outcome, how you look
4 at things?

5 A. No. Like I said, I testify on both sides of cases. I am
6 not somebody who could survive in my profession if I was to
7 take a position that would be advantageous to one or the other
8 side. It needs to be supported.

9 As a CPA, my professional standards require that my
10 opinions be supported by sufficient relevant data and evidence.
11 And that my work, if -- like I said, if I was to be constantly
12 on one side, expressing opinions that would help one or the
13 other side, that information would be brought back up to me on
14 future work.

15 MR. BUCHANAN: Okay. We'd proffer Mr. Tregillis as
16 an expert on the calculations of economic harm, Your Honor.

17 THE COURT: All right. Any objection?
18 Quantification of economic harm, is that --

19 MR. BUCHANAN: Yeah, on the calculations of economic
20 harm. Sorry.

21 THE COURT: Okay.

22 MR. ZEBRAK: May we approach, Your Honor?

23 THE COURT: Yes, sir.

24 NOTE: A sidebar discussion is had between the Court
25 and counsel out of the hearing of the jury as follows:

1 AT SIDEBAR

2 THE COURT: Yes, sir.

3 MR. ZEBRAK: So we have no objection to him being
4 admitted as an expert on financial calculations, all that kind
5 of stuff.

6 But the way that that has been phrased is really to
7 tell the jury that his quantification of economic harm, that
8 he's the expert quantifying the harm. And I just think it's
9 framed in too argumentative of a manner.

10 THE COURT: Okay. Your exception is noted. I'm
11 going to allow him to be qualified with that understanding.
12 That's what he has repeated several times on the stand already.

13 MR. ZEBRAK: Thank you, Your Honor.

14 NOTE: The sidebar discussion is concluded; whereupon
15 the case continues before the jury as follows:

16 BEFORE THE JURY

17 THE COURT: All right. He'll be admitted as an
18 expert in the calculation and quantification of economic harm.

19 Go ahead, Mr. Buchanan.

20 MR. BUCHANAN: Thank you, Your Honor.

21 BY MR. BUCHANAN: (Continuing)

22 Q. What was your assignment in this matter, Mr. Tregillis?

23 A. It was to analyze the amount of economic harm to the
24 plaintiffs in the context of this legal dispute.

25 And, additionally, to consider the opinions of Dr.

1 Lehr and Dr. McCabe; and to the extent that I had thoughts on
2 their opinions, to express those.

3 Q. So you reached some opinions in this case with regard to
4 those issues?

5 A. Yes. If I could just comment, Mr. Gould, I think one of
6 the jurors and I are looking, and you're obfuscating the
7 connection of my line of sight with the jurors.

8 THE COURT: Well, just testify.

9 THE WITNESS: Okay.

10 THE COURT: We can't move your witness box and
11 counsel are allowed to sit in the front row there, so --

12 THE WITNESS: Okay. Very good.

13 I am sorry, could you ask the question again?

14 BY MR. BUCHANAN: (Continuing)

15 Q. Could you -- I asked you, you said you had formed certain
16 opinions. Did you develop some demonstratives or slides to
17 reflect those opinions?

18 A. Yes, I did.

19 Q. Okay. Can we pull up the first slide, please.

20 And is this a summary of your opinions in this matter
21 that you formed based on the information you reviewed?

22 A. Yes, it is.

23 Q. Okay. Could you go through them one by one. The first
24 one says: Dr. Lehr has offered unsupported opinions not tied
25 to the accused wrongful acts of Cox.

1 Why don't you just go through and summarize them.

2 A. Okay. So I think you read it accurately, and that is what
3 I intend to -- intended to depict here. I put these slides
4 together in an attempt to explain my opinions.

5 And so, this one relates to the idea that Dr. Lehr
6 has offered opinions that in some instances, like I said, I
7 find to be not supported, not supported by facts, and in some
8 situations are not tied to the accused wrongful acts of Cox.

9 I think I'll explain that in more detail when we get
10 into it. But he talks about things that are more general harms
11 about piracy generally, but not related to what I understand to
12 be at issue in this lawsuit. That's what that first one
13 relates to.

14 Q. Okay. And the second one?

15 A. The second is using the infringement notices sent by the
16 RIAA, and assuming that each notice represents a displaced
17 legitimate digital download of each track with a copyright in
18 suit, I've calculated what I've referred to as displaced
19 downloads of \$692,000.

20 So for all of the notices, each one, if that was to
21 have a \$1 price tag associated with it, that adds up to
22 \$692,000, if you pick up each of the tracks that has a
23 copyright in suit in those notices.

24 Q. And your third opinion?

25 A. The third is that many users and tracks had few notices.

1 Dr. McCabe testified about the fact that there was one, at
2 least, notice that implicated each of the copyrights in suit.
3 And I thought I would go deeper and say, is it more than one or
4 how many? I thought I would investigate that further.

5 Q. Now, you testified a moment ago that you have additional
6 slides or information with regard to each of these opinions.
7 So could we start with the first of your opinions.

8 Did you prepare some slides to summarize or help with
9 your testimony in that regard?

10 A. Yes. So the first area is, like I said, is my opinion
11 relating to the opinions of Dr. Lehr.

12 And so, what I have done here is put up a slide that
13 was one of his slides in which he talks about, as it says in
14 the title: Piracy harms copyright holders.

15 So like I was saying a minute ago, this is an opinion
16 about piracy, generally. This is not an opinion about the
17 accused wrongful acts of Cox.

18 Cox is accused of engaging in its business in a way
19 that is alleged to be wrongful. Again, I'm not taking on
20 whether it's wrongful or not. That's not my opinion. My
21 opinion though is that any time you're talking about
22 quantifying economic harm, it should be the harm relating to
23 the accused wrongful behavior, not piracy generally.

24 So Dr. Lehr, when he talks about the effects of
25 piracy generally, well, piracy has been something that has been

1 in existence for roughly 20 years. It relates to people
2 engaging in piracy and wrongfully downloading content of all
3 types all across the world on many ISPs relating to works that
4 are not part of this lawsuit.

5 This lawsuit, as I understand it, pertains to, again,
6 the work -- the actions of Cox, whether Cox should have
7 implemented a different policy and procedures and acted
8 differently. So that's what I think is relevant.

9 What I see here is Dr. Lehr opining about piracy that
10 is not part of this case. So just as a general matter, that's
11 my -- one of the big concerns there.

12 Q. Do you have a slide that, you know, summarizes your
13 distinction that you just made between his views and your
14 views?

15 A. Yes. And somebody just forwarded it -- or moved forward
16 to that slide. So, thank you.

17 So what I have done here is put up a comparison of
18 what I view to be Dr. Lehr's analysis, as I understand it, and
19 his testimony, which I read, in this case.

20 So Dr. Lehr is talking about the beginning of piracy
21 from the 1990s through today. I understand this case is about
22 behavior between February 1, 2013, and November 26, 2014.

23 Dr. Lehr is talking about all internet users around
24 the world. I understand this case is about Cox's subscribers,
25 all of which are in the United States.

1 I understand Dr. Lehr is talking about all content,
2 movies, pornography, games, and music. I understand this case
3 is only about music.

4 Dr. Lehr is talking about all music. I understand
5 this case is about only the music owned by the plaintiffs and
6 which is covered by the copyrighted works in suit.

7 So it is just a fundamentally different analysis.
8 And so, when he talks about piracy has these effects, I think
9 that, as I see it, I think it's valuable to put information in
10 front of the jury to provide them with information about what's
11 at issue in this lawsuit, quantifying that.

12 Q. Okay. So do you have any observations about the sort of
13 global nature of piracy that Dr. Lehr testified about?

14 A. Yes.

15 Q. Do you have a slide?

16 A. Well, if you could move forward to the next slide. Now
17 you are sort of above my pay grade on slide creation, so I had
18 some other people create a slightly more complex graph.

19 But, yes, I -- there was a graph that was put
20 together for me that depicts a peer-to-peer network, in this
21 case looking at an example of a transfer of a single file.

22 So imagine there is somebody in Canada who says that
23 they want to get a copy of a track by Van Halen. And they say,
24 okay, I would like to get a copy of that. And they choose to
25 go to a peer-to-peer network.

1 So we see in the center of this a computer that says,
2 okay, let's go find where out there in the world is there a
3 copy of this Van Halen song that I would like to go get.

4 Then the BitTorrent, or other peer-to-peer network,
5 would go search and see who is out there and who has that. And
6 you can see that in this instance there are seven different
7 subscribers from around the world that all have a copy of this
8 file, one of which is the Cox subscriber, it's the fifth one.

9 And so, the user is then able to go get the pieces of
10 that file. And the way I understand that the peer-to-peer
11 network works is the file can be an individual file in its
12 totality or in pieces.

13 So that's a key part of this, is the going and
14 obtaining those packets of information that are then assembled
15 at the computer of that example of that person I used in Canada
16 that would want to go get a copy of that file.

17 Q. So how many subscribers are we talking about in this case
18 with regard to Cox that are implicated with the works in suit?

19 A. How many subscribers are implicated with the works in
20 suit? There are, as I understand it, 57,600 users that have
21 been identified as having a work in suit on their device as
22 part of MarkMonitor's process of investigating. And that's
23 people that have one or two or three or more.

24 So you start out with 57,600. I think 31,700 or so
25 had three notices. But there were, I think, a total of 57,000

1 or so if you consider all of the users that had been detected
2 as having a work in suit.

3 Q. How many subscribers, broadband subscribers, did Cox have
4 at this time frame, 2013 to 2014?

5 A. About 4.5 million, I understand.

6 Q. All right. So you have gone through this slide. Do you
7 have another slide on this same issue?

8 A. Yes. So for purposes of my analysis, what I understand is
9 that if you talk about what's at dispute in this case, it is
10 that the Cox subscriber would potentially not be on the network
11 if Cox had acted differently.

12 Now, I understand one interpretation is all of those
13 57,600 people would have never had any of those notices. If
14 that be the case, then that fifth source of this file to get
15 those packets of information that are assembled on the computer
16 by that user in Canada, that source would not have been
17 available. And then the Canada user would have to go get that
18 packet of information, or packets that came from the Cox user,
19 would have to be obtained from the other sources that have the
20 same file out on the peer-to-peer network.

21 So in this example, that packet is obtained from a
22 Verizon subscriber. That's the effect, like I said, if you
23 wipe out all of those 57,000 users and all of their having ever
24 made those files available on the peer-to-peer network.

25 Q. So going back to Dr. Lehr's slide on piracy generally, do

1 you have specific areas of disagreement?

2 A. Yes. Well, again, what happens here is if you go to the
3 next slide, you'll see one scenario here is that if you have
4 that Cox subscriber that got terminated, then they would
5 presumably go get internet access somewhere else.

6 MR. ZEBRAK: Objection, Your Honor, foundation.

7 THE COURT: Overruled.

8 A. So to the extent that a subscriber goes and gets that
9 service from somewhere else, here you have Time Warner Cable as
10 the subscriber, then that subscriber would be back on the
11 internet, back on the peer-to-peer network and, again, having
12 their file available to have pieces of it that could be
13 downloaded and assembled at that user's computer in Canada.

14 So, ultimately, whether the person would be wiped out
15 completely like in the last slide and you have to go get the
16 packet from a Verizon subscriber, or whether the person just
17 moves to another ISP and then you get it from now what would be
18 a Time Warner subscriber, that's really what we're talking
19 about.

20 And that's just fundamentally not what Dr. Lehr was
21 talking about.

22 BY MR. BUCHANAN: (Continuing)

23 Q. So why don't we go back to Dr. Lehr's slide on piracy
24 generally. And do you have specific areas of disagreement with
25 regard to his other points?

1 A. Yes. Well, we really at the title, just about the
2 difference between piracy generally and what's at issue in this
3 case, and that's a theme throughout these points, but if you go
4 here through the four points that are on this slide, one of his
5 points, the first is: Infringing downloads and uploads
6 displace legitimate sales.

7 And I have done an analysis to reflect that. I think
8 that's my second opinion. So we will probably get to that in a
9 minute.

10 Q. What about your opinions with regard to some of those
11 other points?

12 A. Okay. On the second one, the point is: Piracy
13 negatively impacts pricing.

14 So again, does piracy generally -- over the last
15 20 years, has that had a negative effect on the price of
16 downloads? Does that mean when you go to iTunes and you buy a
17 song for \$1.29, if the world had been different for the last
18 20 years, would the price be higher than \$1.29 per track? Is
19 the price of CDs potentially going to be more than the price
20 that it has been? Maybe.

21 That's not an investigation that Dr. Lehr performed.
22 Dr. Lehr testified and said that -- he said that there is a
23 double effect, that there is both a price and a quantity
24 effect.

25 Well, the way that it works in the field of economics

1 is when we make an investigation, it's possible that if there
2 is a decrease in demand for something, that could be seen in
3 lower prices, it could be seen in fewer sales, but that's
4 something you have to investigate.

5 We go find facts. We look at the pricing history.
6 We say, okay, is there evidence that the price would have been
7 lower or higher? And so, is the \$1.29 a deflated price?

8 That's not an investigation that Dr. Lehr performed.
9 He hasn't quantified it. He has talked about the concept.

10 So there's no evidence of there being a double effect
11 or that there's any piracy, just from music -- or there has
12 been no price erosion as a result of the piracy generally.

13 And then there's certainly no analysis by Dr. Lehr of
14 a price erosion effect related to the wrongful acts accused
15 here. So if you say Cox would've implemented prices
16 differently with its subscribers, and the prices would have
17 been -- or, sorry, the policies would have been different in
18 2013 and 2014, does that mean that the plaintiffs would have
19 charged more for their music if Cox had behaved differently for
20 its 5 percent of the United States internet that is a part --
21 that's less than 1 percent of the world internet?

22 That's not an analysis that Dr. Lehr performed, and
23 there's no evidence of that.

24 Q. Now, what about his third point: Copyright holders incur
25 substantial enforcement costs? Do you have an opinion with

1 regard to his testimony on that issue?

2 A. Yes. And it's just very similar to what I was talking
3 about before. If Cox had behaved differently and implemented
4 different policies -- let's say they would have terminated
5 subscribers earlier, or sent more e-mails, or more aggressive
6 e-mails, or changed its policy, which, again, that's what I
7 understand this lawsuit to be about, would that have caused the
8 copyright holders to have incurred --

9 MR. ZEBRAK: Objection, Your Honor. Can we have a
10 sidebar, please?

11 THE COURT: Yes, sir.

12 NOTE: A sidebar discussion is had between the Court
13 and counsel out of the hearing of the jury as follows:

14 AT SIDEBAR

15 MR. ZEBRAK: I believe he's testifying outside his
16 reports now and really presenting closing argument that
17 Mr. Elkin is intending to give.

18 Mr. Tregillis did two analyses, and Your Honor has
19 seen his reports. He did a works in suit analysis, and he did
20 an analysis where he quantified actual damages looking at the
21 iTunes downloads. He didn't measure overall incentives.

22 And this is a preview of closing argument. And I
23 just -- and it's being directly elicited, Your Honor. I
24 just --

25 THE COURT: He's responding to statements that Lehr

1 made, and he's saying there has been no analysis done by Lehr,
2 no --

3 MR. ZEBRAK: I understand that.

4 THE COURT: -- in this area.

5 MR. ZEBRAK: I apologize, Your Honor.

6 THE COURT: No, it's fine.

7 MR. BUCHANAN: And it --

8 MR. ZEBRAK: Well, let me finish.

9 MR. BUCHANAN: Sorry.

10 MR. ZEBRAK: So, yes, Your Honor, but he was
11 responding to Lehr in his original reports. He didn't analyze
12 Cox's incentives. He didn't say, if Cox had terminated this
13 earlier, that would have happened.

14 This is Mr. Elkin's closing argument via Mr. --

15 THE COURT: Okay. I don't need the preview of the
16 closing argument. I want to know what your objection is to him
17 testifying about these matters. It's outside of his reports?
18 He's never -- he wasn't asked this in his deposition?

19 MR. ZEBRAK: Yes, Your Honor.

20 THE COURT: He doesn't under -- he doesn't know what
21 Cox's incentives, economic incentives are?

22 MR. ZEBRAK: All of the above.

23 THE COURT: How is this admissible?

24 MR. BUCHANAN: His reply report replies to Dr. Lehr
25 and Dr. McCabe, and he talks all about this, about piracy and

1 how generic he is, and he doesn't confine it to the facts of
2 this case. It's all in the reply report.

3 And he's responding to the slides that Dr. Lehr put
4 up, it's directly -- and he is a rebuttal witness. It's
5 covered in his reply report. And it's directly rebutting Dr.
6 Lehr's testimony, both in his reports and --

7 THE COURT: I didn't read anything about Cox's
8 economic incentives regarding infringement, or lack of economic
9 incentive, or whether it's relevant or not. That's where I
10 don't know --

11 MR. BUCHANAN: I didn't -- I'm not sure that he's
12 going in that direction and if he made any reference to that.
13 Obviously, Dr. Lehr spoke at length about that, and Mr.
14 Bakewell responded to that.

15 But we'll keep him, you know, within his reply report
16 and responding to Dr. Lehr's testimony.

17 THE COURT: Okay.

18 MR. ZEBRAK: Your Honor, the notion that he can get
19 on the stand and say anything he wants about piracy and do an
20 analysis from the stand that he never did in his reports, we
21 object to that.

22 And counsel is saying that we'll keep him in his
23 reply report. What he's just gone through, he never said if
24 Cox had done this after these number of steps, that would
25 happened. He made the very thin observation that --

1 THE COURT: He hasn't said that now.

2 MR. ZEBRAK: Well, he has been -- Your Honor,
3 respectfully, I think he has been on the stand saying, had Cox
4 terminated earlier, done this and that.

5 In his report, he object -- he made the very thin
6 observation that Dr. Lehr's analysis isn't an actual damages
7 analysis, he's talking about piracy generally. And this is
8 just well outside his report.

9 And on top of that, they're eliciting testimony about
10 Cox's policy, not about the harm we've suffered. It's, again,
11 not in his report.

12 MR. BUCHANAN: Well, he was making just some
13 assumptions about dealing with Dr. Lehr. Dr. Lehr says, piracy
14 is terrible, it lasted all these years, it had all these
15 impacts. And he never tried to quantify them.

16 He's just pointing that out, let's look at this case,
17 here are the claims, here's the claim period, here are the
18 works in suit. He has looked at those. He has given a price.
19 And he's analyzed about what happens here with the Cox
20 subscriber if he left. I mean, it -- you know, and what -- and
21 that's tied to the dollar --

22 THE COURT: Okay. Let's move into his analysis that
23 was done in his reply brief where he's talking about specific
24 -- the specific numbers and how he calculates what he believes
25 his royalty rate to be, yeah.

1 MR. OPPENHEIM: Sorry. Just one other issue, Your
2 Honor.

3 Twice now, Mr. Tregillis has said, this case is about
4 whether or not Cox's policy was appropriate. That's not what
5 this case is about.

6 THE COURT: Yeah.

7 MR. OPPENHEIM: This case is about copyright
8 infringement. Whether or not Cox's policy was appropriate is
9 not the claim. He shouldn't be testifying as to what this case
10 is about, and that needs to be cleaned up.

11 THE COURT: Yeah. Okay.

12 MR. OPPENHEIM: And if I may, one second issue,
13 because I don't want to have to deal with another jury
14 instruction conference on this issue.

15 He's being asked questions about copying into Canada,
16 and the implication being, well, it's not in the U.S., so
17 there's no infringement.

18 Under the line of cases of Subafilms, any portion of
19 an activity that is infringing in the United States is
20 infringement here and can be rectified here.

21 We -- this shouldn't be inserted into the case so
22 that we have to put an instruction in to the jury about that.

23 THE COURT: I don't know where the Canada stuff was
24 going from either. What's that?

25 MR. BUCHANAN: That had nothing to do with -- that

1 was just --

2 THE COURT: Why is he testifying about it?

3 MR. BUCHANAN: He's testifying -- he was testifying
4 about the -- in his reply report, he responds to a lot of these
5 points that Dr. Tregillis talks about, enforcement costs, and
6 the piracy generating the harm. And he's saying -- he's just
7 giving an example that if you had a subscriber and he left the
8 Cox network, you know, then someone could replace him.

9 The Canada thing, it's just someone coming in and
10 downloading a song. He's not saying it's legal there. It was
11 just part of an example.

12 We're going to get to the whole issue of the piracy.
13 But he has a right, because he did his reply, to respond to Dr.
14 Lehr's points on that chart.

15 THE COURT: To the extent he replied in his rebuttal
16 report, he can testify to that information. Canada wasn't in
17 that report. Using other ISPs wasn't in that report. These
18 are all -- he's just thinking outside the box. And that's not
19 permitted.

20 So let's focus him on what's in the reports.

21 MR. BUCHANAN: Okay. Well, I -- so what you -- when
22 you say, he's thinking outside the box, he was responding to
23 what Dr. Lehr, and he has --

24 THE COURT: He had Lehr's reports.

25 MR. BUCHANAN: And he commented, he said they were

1 way too generic.

2 THE COURT: Well, you can't just they're way too
3 generic. You've got to have -- it has got to be in your
4 reports.

5 MR. BUCHANAN: Well, he did. He talked about how he
6 doesn't tie piracy to harm and into this case, and he talks
7 about that in his reports.

8 So I can narrow it.

9 THE COURT: Let's move him into his --

10 MR. OPPENHEIM: Can we get --

11 THE COURT: Okay. Hold on.

12 MR. OPPENHEIM: -- a clarification for the jury that
13 what this case is about is what you'll instruct them it's
14 about?

15 I'm not asking you to correct him, but at least tell
16 the jury -- because he's now said it twice. He's obviously --
17 it has been in his talking points or whatever has been created.
18 Let's clarify that it's what you say it is. It's not about the
19 policy.

20 MR. BUCHANAN: Well, Judge, I would object to that.
21 I mean, you can do that with the instructions to the jury. You
22 say, you know, I meant -- to call him out and say he's outside
23 of it -- Dr. Lehr, I don't think he answered a single question
24 that I asked him. He was all over the lot.

25 And so, I just don't think it's fair because this

1 witness may be -- in the Court's view, said something that
2 wasn't tied directly to his reports. There shouldn't be an
3 instruction to the jury about that.

4 MR. ZEBRAK: Your Honor --

5 THE COURT: Yeah.

6 MR. ZEBRAK: I was just going to add that we've now
7 seen this with witness after witness, from Dr. Feamster and
8 others, where they're speaking about areas that the Court told
9 them not to speak to.

10 THE COURT: Well, I didn't tell him it's --

11 MR. ZEBRAK: Well, but Mr. Buchanan has --
12 understands that he needs to speak to --

13 THE COURT: What do you want me to say? Do you want
14 me to say that his testimony about what Cox's policy is is
15 not --

16 MR. OPPENHEIM: To the extent that Mr. Tregillis has
17 indicated what this case is about, and that it's about Cox's
18 policy, the jury should disregard that. You will instruct the
19 jury what the case is about --

20 THE COURT: Well, it's his understanding of what the
21 case is about and why he prepared this testimony the way he
22 did, right?

23 MR. OPPENHEIM: That's not what he said. He
24 didn't -- there was no qualification to what he said. Twice,
25 unequivocally, he said this is a case about whether or not

1 Cox's policies were reasonable. It's not a negligence case,
2 and it's not about the policies.

3 THE COURT: Okay.

4 MR. ELKIN: Thank you, Your Honor. I think he's --
5 Mr. Oppenheim is extending what he said. What he said, I heard
6 it a couple times now, because he did say it, that his
7 understanding of the case is not about X, it's not about Y.

8 I think how this case gets characterized -- I think
9 Mr. Buchanan can certainly rein him in to not elicit any of
10 that sort of going forward. But the notion that somehow there
11 should be some instruction to the jury about what the case is
12 about and what the case is not about, I think it is not
13 necessary at this point.

14 THE COURT: I'm not going to give them an instruction
15 at this stage. Your exception is noted.

16 MR. ZEBRAK: Your Honor, one final --

17 THE COURT: But let's rein in him.

18 MR. ZEBRAK: One final thing.

19 THE COURT: No, come on. We've had six roundabouts.

20 MR. ZEBRAK: Yes, Your Honor.

21 NOTE: The sidebar discussion is concluded; whereupon
22 the case continues before the jury as follows:

23 BEFORE THE JURY

24 THE COURT: All right. Mr. Buchanan, please
25 continue.

1 BY MR. BUCHANAN: (Continuing)

2 Q. Okay. So back to with regard to the third bullet:

3 Copyright holders incur substantial enforcement costs.

4 So are you aware of some of the costs that were
5 discussed by Dr. Lehr that are involved in this case in terms
6 of enforcement?

7 A. Yes.

8 Q. Okay. And for example?

9 A. These would include costs like hiring MarkMonitor to
10 investigate and sweep the internet. And hiring Audible Magic.
11 It would include litigation costs. Those kinds of expenses
12 that the copyright holders have incurred relating to enforcing
13 their cases.

14 Q. Payments to the RIAA, would they be included?

15 MR. ZEBRAK: Leading, Your Honor.

16 THE COURT: Overruled.

17 A. Yes.

18 BY MR. BUCHANAN: (Continuing)

19 Q. Okay. And in -- what about internal costs, for example,
20 if the music companies had an individual --

21 THE COURT: You can ask him whether he understands
22 internal costs, but don't lead him beyond that, please.

23 MR. BUCHANAN: Okay.

24 BY MR. BUCHANAN: (Continuing)

25 Q. What about internal costs, say of the music companies,

1 with regard to enforcing piracy?

2 A. Yes, I understand there are internal people who work on
3 this at the music companies as well.

4 Q. Okay. Are those costs that you believe could have been
5 calculated?

6 A. Yes. That's a concern that I have with Dr. Lehr's
7 opinion, is that this is a blanket six words on a slide rather
8 than reflective of an investigation that he performed. He
9 didn't interview, didn't look at those records, didn't make any
10 analysis of the quantum here that I believe would be something
11 he could have investigated.

12 Q. And do you believe whether he even attempted to do that?

13 A. I'm aware -- I'm not aware of him having attempted to do
14 that. There was no testimony about attempting to do that.

15 Q. Okay. So the fourth bullet here: Piracy deters future
16 investments and reduces incentives to create. This is from
17 Dr. Lehr's slides.

18 Do you recall any testimony from him in his efforts
19 to try to quantify this or measure it in any way?

20 A. No. Again, this is just a generalized description of
21 piracy generally and talking about deterring future investments
22 and incentives to create.

23 I would think -- I haven't seen any evidence that
24 there are fewer songwriters writing songs or writing fewer
25 songs because of Cox's actions.

1 And the investments, I'm not aware of any evidence of
2 any investments that the music companies would have made that
3 they didn't make because of Cox's investments -- or Cox's
4 behavior in --

5 THE COURT: So you don't know one way or the other,
6 right? You didn't do any discovery on that yourself; is that
7 right?

8 THE WITNESS: That's right. I'm not aware of any.

9 THE COURT: All right. I will strike your last
10 answer.

11 Let's proceed, please.

12 BY MR. BUCHANAN: (Continuing)

13 Q. Okay. Now, Dr. Lehr, you recall, he also testified about
14 alleged benefits to Cox. Do you recall that?

15 A. Yes.

16 Q. Okay. And do you have a slide on that?

17 A. Yes.

18 Q. Okay. So why don't you, you know, tell the jury and the
19 Court what your opinions are with regard to Dr. Lehr's attempt
20 to show the benefits to Cox.

21 A. Again, what I see here is a description of Cox's benefit
22 from the infringement of its network. If you go to the second
23 line on there -- I think the first line has been testified to
24 by others. But the second line: The repeat infringers paid
25 Cox more for internet service on average and likely purchased

1 more expensive internet plans.

2 Dr. Lehr did look at data on that one. And he
3 concluded, I think, there was about an 8 percent higher fee
4 paid by those subscribers that were the subject of 20 or more
5 notices, the residential subscribers with 20 or more notices,
6 compared to those with one or two notices.

7 My problem with that calculation is he has grabbed
8 two extremes. By looking at those that have 20 or more
9 notices, that is a very small number of subscribers in that
10 category. And to say, I'm going to compare those with the very
11 smallest group and say there is an 8 percent difference, that's
12 a very small amount of difference for grabbing the two
13 extremes.

14 He made no analysis of the everybody-in-between
15 group, the threes and fours and fives, and didn't say that
16 those were found to have had any significantly different amount
17 of data usage or fees compared to anybody else.

18 So it's sort of cherry-picking to grab only the very,
19 very highest and say that you're going to compare those to the
20 very lowest.

21 Q. When you referred to notices, did you mean tickets?

22 A. Yes.

23 Q. Okay. So also, did you hear Dr. Lehr's testimony with
24 regard to whether he considered the pricing for packages for
25 internet services geographically and if he calculated that into

1 his equation?

2 A. He didn't. I understand that Cox has -- charges different
3 rates to different people based on things like geography. For
4 example, I think there is a different rate in Connecticut
5 compared to other states. That's not something that Dr. Lehr
6 considered or accounted for when he did his analysis comparing
7 the two far ends to see if there was any difference in rates.

8 So there can be rate fluctuations for other reasons.

9 Q. And what about the issue of a notice or a ticket equalling
10 a download, did he analyze that at all?

11 A. When you say -- the idea of a notice or a ticket not
12 equalling a download, what do you mean by that?

13 Q. So do you recall whether he attempted to equate each
14 notice with additional data because it related to another
15 download?

16 A. Oh. No. The identification of a ticket is just that
17 there was somebody who had a file available at a given time,
18 and that that showed up in the CATS system --

19 MR. ZEBRAK: Objection, Your Honor. He's not a
20 technical expert.

21 THE COURT: Sustained.

22 MR. ZEBRAK: I move to strike.

23 THE COURT: Strike the last answer.

24 Ask your next question.

25 BY MR. BUCHANAN: (Continuing)

1 Q. So did --

2 THE COURT: Mr. Tregillis, you're here to testify as
3 a forensic economist and quantify it. This testimony about
4 matters that you weren't asked to testify about and which you
5 have demonstrated you don't have independent knowledge about,
6 you're just assuming, is not proper.

7 So let's testify about what you're here to testify
8 about, and not these other beliefs that you may have which are
9 outside of your reports and your deposition. Okay?

10 Do we understand each other?

11 THE WITNESS: Thank you very much, Your Honor. Yes.

12 THE COURT: All right, thank you.

13 Let's go.

14 BY MR. BUCHANAN: (Continuing)

15 Q. So in your reply report you discussed this testimony by
16 Dr. Lehr about the -- comparing the people with one to two
17 notices versus those with over 20 notices, correct?

18 A. Yes.

19 Q. Okay. Were you able -- and he calculated -- if you
20 recall, he calculated in his report how much data might be used
21 by the people that had 20 or more, there would be more data.
22 Do you recall that?

23 A. Yes.

24 Q. Did you happen to calculate what it would take for, say
25 the subscribers, the 57,000 subscribers of Cox, if they wanted

1 to download all the data and -- or the music that he indicated
2 in his reply report or his report?

3 MR. ZEBRAK: Objection, Your Honor. It's outside the
4 scope.

5 THE COURT: Well, overruled. I'm going to let him
6 answer the question.

7 Do you understand the question? And is it part of
8 your analysis, sir?

9 THE WITNESS: It is. It's in my reply report, and
10 I'm aware of what he's asking about.

11 THE COURT: All right. Please go ahead, then.

12 A. I did perform that analysis. And what I calculated was
13 that there are in this dispute a number of notices that have
14 been identified. And if you look at all of files that are in
15 those notices for all of the time period from 2012 through the
16 end of the notice period, the end of the claim period in 2014,
17 if you take all of those files and you were to have the 57,600
18 subscribers, and all of them were to be at the bottom tier of
19 Cox's programs, it would take 1 percent of one month to
20 download all of the files that were -- and all of the notices,
21 all of the occurrences that are at issue in this case, even
22 those beyond this case, going back to 2012.

23 BY MR. BUCHANAN: (Continuing)

24 Q. Okay. Under any particular package?

25 A. Under the bottom package, I think it's called the Standard

1 Package.

2 MR. ZEBRAK: Your Honor, may we have a brief sidebar?

3 THE COURT: Yes, sir.

4 NOTE: A sidebar discussion is had between the Court
5 and counsel out of the hearing of the jury as follows:

6 AT SIDEBAR

7 MR. ZEBRAK: Sorry, Your Honor, I was confused. I
8 thought it wasn't in his report. I lost it. I apologize. He
9 is -- close enough.

10 THE COURT: Okay. All right, thank you.

11 NOTE: The sidebar discussion is concluded; whereupon
12 the case continues before the jury as follows:

13 BEFORE THE JURY

14 BY MR. BUCHANAN: (Continuing)

15 Q. So let's go to bullet number 3: Cox saved costs by not
16 addressing copyright infringement.

17 So on bullet 3, that relates to Dr. Lehr's testimony
18 about the costs saved by Cox by not addressing copyright
19 infringement. Do you have an opinion about that?

20 A. Yes. It's similar to what I expressed earlier about
21 whether Cox saved moneys. It's not an instance in which Dr.
22 Lehr performed a calculation, didn't investigate that.

23 Q. Okay. All right. Let's go to your second opinion: Using
24 the infringement notices sent by the RIAA, assuming each notice
25 represents a displaced legitimate digital download of each

1 track with a copyright in suit, I calculate displaced downloads
2 of \$692,000.

3 Now, you briefly described that before. Can you now
4 go into more detail for the Court and the jury on that issue.

5 A. Sure. I think if you move forward in the slides, you'll
6 start to see the slides that I created to try to explain this.

7 Q. Okay. This says: Works in suit claimed by plaintiffs.
8 And you've got some calculations here.

9 What's purpose of this slide.

10 A. Well, it explains how my whole analysis started. Like I
11 said, it's similar, it seems to me, to what Dr. McCabe did,
12 which is probably why we ended up with pretty similar outcomes.

13 And so, as Dr. McCabe testified, there are a
14 combination of sound recordings and musical compositions. And
15 if you add those up, that gets you to works in suit, which are
16 alleged by the plaintiffs to be 10,017.

17 So a sound recording, as I tried to put into the
18 picture here, I understand for purposes of my analysis relates
19 to a recording of a track.

20 And the musical composition, I think of it more like
21 sheet music. It's not specific to who would have performed
22 that -- performed that song.

23 So that's where it starts, is with what are -- these
24 lists of the sound recordings and the musical compositions.

25 Q. Okay. Could you walk us through the process on this

1 particular opinion.

2 A. Yes. I think if you go to the next slide, what I did here
3 was I copied in the first ten lines of this sound recordings
4 list, which is PX 1 on the left, and the musical compositions
5 list on the right, PX 2.

6 And like I said, this is just the first ten lines.
7 There are 6,734 lines to the sound recordings. And 3,283 lines
8 to the musical compositions.

9 So, for example, you can see Alabama, Alan Jackson,
10 Alicia Keys, and then it lists the tracks. So for the sound
11 recordings, you have who performed it, and the track, and the
12 title of that song.

13 And then it has the registration number and the
14 plaintiff, as you can see on PX 1 on the left.

15 And then on the right, you don't have the performer
16 because it's just the music. It doesn't -- if you have
17 different artists that are performing the same track, it would
18 still implicate the same copyright. It doesn't matter who is
19 singing it.

20 So that's how we get to -- that's where my analysis
21 starts, is looking at PX 1 and PX 2.

22 Q. Okay. So there has been some testimony about how this
23 information was gathered and notices were sent with regard to
24 like MarkMonitor and Audible Magic.

25 You did not investigate their work, did you?

1 A. No. For purposes of my analysis, I understand there is
2 some issues of dispute about whether the Audible Magic and
3 MarkMonitor --

4 MR. ZEBRAK: Objection, Your Honor. He doesn't need
5 to proffer --

6 Q. Did you --

7 THE COURT: I'm sorry. I'm sorry, there's an
8 objection. Sustained.

9 BY MR. BUCHANAN: (Continuing)

10 Q. Did you --

11 THE COURT: Ask your next question.

12 Q. Did you consider Audible Magic or MarkMonitor, did you
13 look into anything they did?

14 A. No, I didn't. I accept that at face value.

15 Q. Okay. Thank you. So -- okay. You've identified this.
16 Can you give us -- I think you gave us the detail here. So
17 what did you do with this information?

18 A. Well, if you go to the next slide, then, again, it's going
19 back to the start. And go forward one more.

20 What happens in my investigation is I'm trying to
21 understand how a download works, as I've tried to show that
22 graphically. And I understand that there is a MarkMonitor
23 investigation that found -- in this case user A has a -- I put
24 a little yellow symbol there to show that there is a track that
25 was identified as part of a file on a user's computer. And

1 they got that from the users on the right.

2 So when I see that there is a MarkMonitor notice or
3 an RIAA-sent notice that MarkMonitor put together, then you
4 know that somebody had gotten that file. And for purposes of
5 my analysis, I'm assuming they got it from a peer-to-peer
6 network wrongfully.

7 Q. Okay. So how did you use these infringement notices in
8 your analysis?

9 A. The infringement notice, we have three examples here, and
10 then I'll show you the process that I undertook in making my
11 investigation.

12 So you start off, I have the three notices here.
13 This is for a track by Nicki Minaj called "Marilyn Monroe." As
14 it says in the title at the top, there is no sound recording,
15 but there is a musical composition, and it has two different
16 numbers for it. And you can see it was detected three times.
17 It was in 2013, in August and October and December.

18 And you can see the title and the artist and then
19 what is called the hash text. And a hash text is the number
20 that is unique to this electronic file. That's the Audible
21 Magic hash text. And then you can see the file name and where
22 it was found.

23 MR. ZEBRAK: Objection, Your Honor. He's -- again, I
24 think he's testifying as to the underlying technology.

25 THE COURT: No. I'll allow him to testify.

1 THE WITNESS: Okay.

2 THE COURT: Just at this level. You're not
3 testifying about the technology and how it all works.

4 THE WITNESS: Exactly. Understood.

5 THE COURT: All right. Go ahead.

6 BY MR. BUCHANAN: (Continuing)

7 Q. Okay, proceed.

8 A. So for purposes of my analysis, I took the hash text from
9 the notices, and then I went to the Audible Magic dataset, and
10 that's what's shown in the second part there that starts with:
11 Torrent ID.

12 And from the Audible Magic dataset, I could see the
13 same what's called info hash or hash text. And then the
14 Audible Magic dataset tells me what is in that file, because
15 you could have a file that has one song or a lot of songs, some
16 are an album, for example. And so, Audible Magic tells me
17 that.

18 And here what this tells us in Audible Magic is that
19 this hash file, this electronic file that is sitting on
20 someone's computer, has Nicki Minaj's "Marilyn Monroe." That's
21 the only file or the only track that is part of this file.

22 So then I take it in the green box and say, now let's
23 go see if I can find Nicki Minaj's "Marilyn Monroe" in PX 1 and
24 PX 2.

25 So I trace it through. And sure enough, you can see

1 "Marilyn Monroe" is part of the PX 2, which is the list of the
2 musical compositions. So there's -- it's not in the sound
3 recordings. There's nothing by Nicki Minaj in the sound
4 recordings. But Nicki Minaj does have tracks that are in PX 2
5 in the musical compositions.

6 So this is line 3,220, and shows us where it is in
7 PX 2. And it tells us there who owns it and it lists the
8 copyright registration numbers.

9 So as you can see, I summarize at the bottom, you
10 have three notices, they're all in 2013. There's one hash ID.
11 And it's a musical composition, but not a sound recording.

12 So I employed a similar analysis for all of the
13 tracks and all of the files and all of the copyrights. I have
14 another example that goes the other way in the next slide.

15 Q. Okay. So what does this slide indicate to you, it's Katy
16 Perry, "Hot and Cold"?

17 A. Yes, so now it's flipped. Now this is a sound
18 recording -- you can see at the top, I showed the small piece
19 from PX 1. And you can see in PX 1, it's Katy Perry's "Hot and
20 Cold." You can see the sound recording number.

21 And then if you go look in the notice dataset, you
22 can see during the claim period, there were 46 times that "Hot
23 and Cold" was in there.

24 And again, there's a sound recording, but no musical
25 composition. And if you follow that through, you can see in

1 2013, there were 31 of them. And in 2014, there were 15 of
2 them.

3 And then over on the right, I observed that sometimes
4 you would see the same hash ID at the same location in multiple
5 -- and there -- on multiple days. So there's a new notice each
6 time that the MarkMonitor people found that same file at the
7 computer, the same computer on another day, it shows up in a
8 unique notice.

9 Q. So in looking at all this notice data, did you reach any
10 conclusions?

11 A. Yes. I think if you go to the next slide, you can see by
12 going through that whole process for all of the notices, there
13 are 162,000 notices for the claim period. 162,502 from
14 February 1 to November 26. I was able to make that
15 investigation and I observed what I described here. Which is,
16 like I said, each notice allegedly states that a file was
17 available for download on that day.

18 So if you have it observed available on other days,
19 that's going to show up in another notice. The notice can be
20 for a hash ID with one track or many. I described that
21 earlier, how it could be an album for a particular hash ID or
22 it could be just one song, like in the case of "Marilyn Monroe"
23 by Nicki Minaj.

24 And then also, many of those hash IDs that were found
25 in the claim period don't relate to the works in suit. There

1 was about 49,000 and change that didn't have a work in suit,
2 but 113,000 I found that did.

3 And then also, like I said earlier, there are a lot
4 more of these in 2013 than 2014.

5 Q. Okay. So what did you do next with this data?

6 A. If you go to the next slide, I think that -- well, here we
7 go back to that next slide. And continue one further. There
8 you go.

9 So what you found -- or what I found is, I was
10 able -- Dr. McCabe said he found all of the 10,017 claimed
11 works in suit. I was able to find 9,801 of them. So that's
12 98 percent agreement.

13 There are some examples where I disagreed with him.
14 It really is situations in which he has found what he thinks is
15 the musical composition. It looked to me like it wasn't the
16 same musical composition. It might be a different song with
17 the same title, and I thought that he had made an improper
18 connection.

19 But for purposes of my analysis, I'm just giving him
20 the benefit of the doubt. It's only 2 percent, so I'm just
21 going to assume all of them, even if I disagree. I'm going to
22 give him those anyway for purposes of my analysis.

23 Q. Okay. So let's go to the -- you looked at the notices and
24 tracks. Let's go to the next slide, and this is: Displaced
25 download and revenue share to plaintiffs.

1 So what does this depict and how does this relate to
2 your conclusions and analysis.

3 A. Well, like I was saying earlier, I calculated displaced
4 downloads of \$692,000. So I tried to put together a graph to
5 explain what that means. What that means is, we have examples
6 where this user on the left has gotten files from those three
7 people that are each through BitTorrent making files available
8 and pieces of files that could be assembled on that user on the
9 left's computer.

10 What I'm saying is, if that didn't happen and it
11 didn't go through path 2 and it went through path 1, then what
12 does that turn into?

13 And you can see if that had been a legitimate
14 download, it would have been a purchase for between \$0.79 and
15 \$1.29 through iTunes. And there's a part of that, a revenue
16 share that goes to the plaintiffs.

17 So for those that, like I said, it's a range of \$0.79
18 up to \$1.29, I looked at the information that the plaintiffs
19 produced about how much their revenue share is, and I rounded
20 it up. And it looks at about \$0.90 for sound recordings and
21 \$0.10 for musical compositions.

22 And so, I used that in my calculation of the money
23 that the plaintiffs would have gotten if these downloads, that
24 group of downloads had gone through channel 1, had all been
25 iTunes types of purchases, instead of getting them from

1 BitTorrent or another peer-to-peer network.

2 Q. Okay. So did you do any analysis or make any assumptions
3 with regard to whether if someone downloaded a song, whether
4 that same person would have purchased that same song from
5 iTunes if they were unable to download it?

6 A. Yes. I think Dr. Lehr testified about that. There was a
7 question for many of these people who are going the route of
8 BitTorrent, would these people, if they weren't able to do that
9 and go through BitTorrent or a peer-to-peer network, would they
10 have purchased something from the plaintiffs?

11 Dr. Lehr said that it might not be all of them. And
12 I agree, it might not be all of them. But for purposes of my
13 analysis, I assumed every one of them, even if it's somebody
14 that maybe wouldn't have, I'm assuming they all would have
15 bought a download through iTunes or a similar source.

16 Q. Okay. So you talked about looking at the tracks and the
17 notices. And so, what did you find or conclude after looking
18 at them and comparing them?

19 A. I think if you go to the next slide, you can see here the
20 results of what I found.

21 And that is, there are 677 total, what I call, track
22 notices. So I described earlier how there is that dataset of
23 the notices of about 162,000, about 113,000 of which contain
24 the works in suit. But this shows that there are about six
25 tracks per notice, because there are a lot of albums.

1 And so, if you say that each one -- let's say there's
2 an album of ten tracks, that's going to turn into \$10 that
3 would go to the plaintiffs for purposes of my analysis, because
4 it depends on how many tracks are in each notice.

5 And so, all of the tracks in all of the notices gets
6 you to 677,000 of the ones that I was able to trace. And that
7 is for a total of 7,421 tracks that are covered by those 9,801
8 works in suit that I found.

9 So it's a little higher if you give the benefit of
10 the doubt to Dr. McCabe and the plaintiffs. Instead of 9,801
11 works in suit, then it goes all the way up to the 10,017. And
12 7,421 becomes 7,608.

13 Q. You used the term "a conservative approach or analysis"
14 several times. What do you mean by that?

15 A. There were multiple times in my analysis where I used what
16 I thought were conservative inputs. Like, for example,
17 assuming all of these would have turned into legitimate
18 downloads that the plaintiffs would have gotten paid for.
19 That's an example.

20 But I think in the next slide, perhaps -- there you
21 go.

22 So you can see in the next slide that there is the
23 benefit of the doubt on that 2 percent. So although there are
24 some with which I think Dr. McCabe, I think, got it wrong, I'm
25 saying, put those in there anyway.

1 Also, I'm giving the plaintiffs a dollar per track no
2 matter how -- what copyright they hold. Because as we
3 described earlier, like the Nicki Minaj track where they just
4 have a musical composition, if all they have is the musical
5 composition, they would only get the \$0.10 musical composition
6 royalty for their revenue share.

7 If they have just a sound recording, like with Katy
8 Perry, they just would get \$0.90.

9 I have assumed that for all of the 7,421 tracks, they
10 have all -- well, actually 7,608, I'm assuming -- because I'm
11 giving them the benefit of the doubt, I'm going -- I'm adding
12 that 2 percent in there.

13 So for all 7,608, they get credit for having a sound
14 recording and a musical composition, even if they only have
15 one, which is frequently. Normally they have only one. I gave
16 them the benefit of having both, gave them a dollar, not just
17 \$0.90 or \$0.10.

18 Q. And you used the word "track." What do you mean by
19 tracks?

20 A. Well, like I said, a track is a song. And so, you have
21 copyrights, there are 10,017 copyrights, but only 7,608 tracks.
22 And that's because some of the tracks have both a copyright
23 and -- a copyright and a musical composition and a sound
24 recording. So you're going to have fewer. There's a piece
25 that have just one, there's a piece that have just the other,

1 and then there's a piece that has both.

2 So as a result, because there is overlap, then that
3 ends up being a smaller number.

4 MR. OPPENHEIM: Your Honor, I think we discussed this
5 earlier, I would object and move to strike. This was, I
6 believe, a product of a very lengthy earlier discussion.

7 THE COURT: Yeah, sustained. I'll strike the last
8 answer.

9 BY MR. BUCHANAN: (Continuing)

10 Q. So, Mr. Tregillis, you are aware that the plaintiffs claim
11 that your assessment of a dollar per track is -- doesn't
12 measure the true amount of harm.

13 Do you understand that?

14 A. Yes.

15 Q. Okay. And what is your response to that?

16 A. Mr. Zebrak, in his deposition of me, asked me questions
17 about the dollar and my justification for that. And I think
18 that my dollar rate is an appropriate rate. I think that as I
19 identify here, there are some conservative elements of it. For
20 example, the use of a dollar even if the plaintiffs only have
21 one form of copyright. I think that that's conservative.

22 If it -- if they only have a musical composition at
23 \$0.10 and I'm giving them a dollar, I think that's
24 conservative.

25 Q. So your third point then: Each notice included, even has

1 the same hash ID.

2 Can you explain that?

3 A. Yes. So what I've done here is if you have a download of
4 a track on a -- identified on a user's computer, and it shows
5 up three days in a row, I'm saying that I'm going to triple
6 count that and say that although it seems to be the same file
7 on the same computer multiple days, I'm going to have the -- a
8 dollar for each of those tracks each of those days.

9 I think that's conservative.

10 Q. Okay. And what about with regard to your fourth
11 conservative assumption with regard to Dr. McCabe?

12 A. I'm including all notices, not the standard that
13 Dr. McCabe had used. Dr. McCabe had said that he was looking
14 at all of the notices, had shown all of the copyrights at issue
15 if the user had been the subject of two prior notices.

16 So I'm not using that standard. I'm using all of the
17 notices.

18 Q. Okay. Now, I'd like to move to your third opinion: Many
19 users and tracks had few notices.

20 And James will take us there when he gets a chance.
21 Thank you, James.

22 Could you explain this.

23 A. Yes, I can. I wanted to look deeper at the users and
24 tracks that are at issue here. Dr. McCabe said he found each
25 of them one time, at least one time. And I wanted to know how

1 many times are we finding these.

2 So I put together some examples to show this, and I
3 have total numbers as well.

4 Q. Okay. James, could you --

5 So -- okay. What does this slide depict?

6 A. So this is all notices in the claim period by -- for
7 tracks covered by -- or tracks by the artist Jamiroquai. And
8 you can see, there is one song called "Virtual Insanity." And
9 all of these, there were, it looks like, eight notices. And
10 there are eight notices, they all happened in a one-month
11 period. They all happened in October of 2014.

12 And then I summarized that at the bottom. And you
13 can Jamiroquai, you can see there is just an SR, a sound
14 recording. There's no musical composition. It's all on one
15 hash ID. And it appeared eight times in October of 2014.

16 Q. Okay. And why did you pick this particular artist and
17 this information?

18 A. This is just an example that I found. I grabbed a few --
19 I think four of them that I'm showing here.

20 Q. All right. And I think you have one on Van Halen; is that
21 right?

22 A. Van Halen, this is all notices in the claim period for
23 Van Halen.

24 So for all of Van Halen's songs, these all come from
25 one album of Van Halen's, from -- it's called "1984," which is

1 Van --

2 MR. ZEBRAK: Objection, Your Honor.

3 THE COURT: I'm sorry?

4 MR. ZEBRAK: Objection, Your Honor, foundation. I
5 could explain on a sidebar, but he's now testifying about --

6 THE COURT: All right. Approach the bench, please.

7 NOTE: A sidebar discussion is had between the Court
8 and counsel out of the hearing of the jury as follows:

9 AT SIDEBAR

10 THE COURT: Yes, sir.

11 MR. ZEBRAK: So, Your Honor, from recollection, I do
12 believe he talked about Van Halen in his report. But in his
13 answer he's now talking about appearance of these tracks on
14 albums. And I want to be very careful that he's not going to
15 do what Your Honor just struck from his slides and now talk
16 about interrelationship between tracks and albums. It has
17 nothing to do with his damages analysis or how he determined
18 the works in suit.

19 MR. BUCHANAN: He is not going to do that.

20 THE COURT: Okay.

21 MR. ZEBRAK: Well, he just mentioned an album, Your
22 Honor. This keeps happening.

23 THE COURT: All right. Let's just focus --

24 MR. BUCHANAN: Well, there is a calculation between,
25 you know, sound recording and musical composition, which he

1 testified about. So each one of these things is in his report.
2 He is just testifying about that he has looked at them, and it
3 shows the frequency of those artists. So he has picked three
4 very popular artists. It shows the frequency of how many times
5 they got tickets, people got tickets or notices related to
6 works. And that's the information, all that information is in
7 the report. He laid it all out. They had a right to depose
8 him on that, and now they are just trying to box him in.

9 MR. ZEBRAK: Your Honor, I have no objection to him
10 discussing how he did his damages analysis. He doesn't need to
11 discuss albums. Which is the issue -- the interrelationship
12 between tracks and albums. He didn't do an analysis of all
13 that. It does not involve his damages calculation.

14 He is now straying into the area that should be off
15 limits.

16 MR. OPPENHEIM: And I believe the demonstrative shows
17 that there are three SRs for those tracks. So there is no
18 foundation. I mean, he can't look at it and say, well, it is
19 one SR or it's one album. You can't determine that unless you
20 go outside of the record. And I don't know whether its true or
21 not.

22 MR. BUCHANAN: Look, he got this information, it's in
23 his report. Whether it's a sound recording or musical
24 composition, it's in PX 1 and PX 2, he looked at that. He
25 looked at the notice data, the ticket data. And all this

1 information is in his report.

2 So he did determine whether it is a sound recording
3 or musical composition, whether it's an album or a single, all
4 that.

5 THE COURT: I understand that. All right. Let's
6 stay away from albums and move forward. Thank you.

7 MR. ZEBRAK: Thank you, Your Honor.

8 NOTE: The sidebar discussion is concluded; whereupon
9 the case continues before the jury as follows:

10 BEFORE THE JURY

11 BY MR. BUCHANAN: (Continuing)

12 Q. So were you finished explaining on the Van Halen notices
13 in the claim period?

14 A. No, I was not. What I observed here with Van Halen was,
15 like I said, it is nine tracks that are all from the Van Halen
16 album "1984" --

17 MR. ZEBRAK: Objection, Your Honor.

18 THE COURT: Yeah.

19 BY MR. BUCHANAN: (Continuing)

20 Q. Just refer to tracks.

21 A. Okay. Very good. I observed nine tracks here. And they
22 were all part of -- you can see on the far right, there is a
23 hash ID on the far right that shows up as 1, and one of them is
24 2.

25 So there is a hash ID that covers this whole set of

1 tracks. And then there is an additional hash ID that just
2 covers the top track. And then you can see how many notices.

3 So for the hash ID that covers all of the tracks,
4 there were five of those in the claim period. And then there
5 is another hash ID, like I said, for just the top track,
6 "1984," and there were two extra ones of those.

7 The five that occurred for the whole album were in
8 2013. And then there was one -- the other one, like I said,
9 the two instances in 2014 relating to the single.

10 Q. Okay. Now, I think you also did a same sort of chart and
11 analysis for Celine Dion; is that correct?

12 A. Yes. I thought I would try a different kind of music
13 here. So now we're looking at Celine Dion for all the notices
14 in the claim period for Celine Dion. And you can see a range
15 of outcomes. Her "My Heart Will Go On" track from "Titanic" is
16 the biggest at 214 notices. And then the number goes down to
17 as few as five notices.

18 And it depends on the number of hash IDs because each
19 hash ID shows up some number of times. And if you add those
20 all up, that's what you see here for Celine Dion. And there
21 were far more "My Heart Will Go On" notices than there were the
22 ones that had the tracks at the bottom with as few as five.

23 So it's a range. In this case, again, I'm showing
24 the sound recordings and the musical compositions. All of
25 these have sound recordings. Six of them have musical

1 compositions. Again, there were more in 2013 than 2014.

2 Q. So did you do any analysis of the tickets and notices
3 during the claims period for the -- regarding the music in this
4 suit?

5 A. I don't understand your question.

6 Q. Okay. Go to the next slide.

7 Okay. We have one more, Annie Lennox.

8 A. Yes.

9 Q. And did you do a similar analysis with regard to Annie
10 Lennox as you did the other artists?

11 A. Yes, I did. So here we have one hash ID that covers all
12 of these -- well, I didn't mean to touch the screen. Sorry
13 about that. Ten tracks. And there are 17 notices. They are
14 covered by a combination of sound recordings and musical
15 compositions, as you can see in the -- now that I know I can
16 touch the screen and make a dot on it -- they are covered in
17 those two columns SR and MC.

18 So you have a combination, like I said.

19 Q. Does "SR" stand for sound recording and "MC" stands for
20 musical composition?

21 A. That's right. And like I said, there's a total of 17
22 notices for all of Annie Lennox's music for the claim period.

23 Q. So did you attempt to analyze how many users had had how
24 many notices in the claims period?

25 A. Yes, I did.

1 Q. Okay. And did you prepare a graphic or a demo for that?

2 A. Yes, I did.

3 Q. Okay. And so, we're looking at this. And so, what does
4 this depict?

5 A. Well, I guess my green dots from touching the screen are
6 still there, so sorry about that.

7 But what I see here is this pie reflects the -- well,
8 this is the pie that I put together. And it reflects how many
9 notices are we talking about for users. And during the claim
10 period, you can see out of the 57,000, 31,000 had one or two
11 notices during the claim period.

12 And then you can see the distribution for notices in
13 the claim period to 51 or more, there are 14 of them in that
14 category.

15 So about 70 percent of them were in the one or two
16 notices in the claim period.

17 Q. Okay. How does this compare to Dr. McCabe's analysis?

18 A. Well, there is a difference, which is Dr. McCabe was
19 looking at notices for a longer period of time. I was saying
20 for just the claim period.

21 So he had, I think, a little bit under half in the
22 one to two category. If you look as just the claim period, the
23 one to two category gets a lot bigger.

24 Q. Okay. Do you have a slide that shows different -- the two
25 and the five and above as well?

1 A. Yes. I -- like I said earlier, I wanted to investigate
2 this idea of that if you have all notices included, then you
3 have notices per track.

4 And you can see the blue section of the pie is the
5 number of notices -- or number of tracks that have 1 to 50.
6 And then copper or orange, I guess, is 51 to 100. And then 101
7 to 500. And 501 to 1,000. And 1,001 plus.

8 You can see if you consider all of the notices,
9 instead of disqualifying the first and the second the way that
10 Dr. McCabe did, then more conservatively you can see what the
11 pie distribution is.

12 I attempted to use a method more similar to what Dr.
13 McCabe did by looking at above the first two. After the first
14 two, if you look at just those, then you can see, as you would
15 you expect, that you have fewer notices per track. And so, the
16 blue part of the pie gets bigger.

17 And then if I adjusted that to another standard, what
18 if you were to look after the first five notices per user, then
19 you see a much smaller number here of notices per track.

20 And the number of tracks also falls because some of
21 these would fall away if you start eliminating notices. But
22 you can see that the lion's share of these have very few
23 notices. It's over half, even if you're including all of the
24 notices in the 1 to 50 category. And it just gets to be more
25 and more of them that fall into that category if you're willing

1 to take out the initial two or initial five notices.

2 Q. Mr. Tregillis, could you summarize your opinions in this
3 case one last time.

4 A. Well, I think I identified three of those --

5 Q. Can we pull that -- go ahead.

6 A. The three areas -- it's fine, I can describe them. I had
7 areas in which I disagree with Dr. Lehr because I thought his
8 opinions were disconnected or not supported by facts and
9 investigation.

10 The second is I calculated that 692,000 using what I
11 think is a conservative methodology. And the third is, I found
12 that there were many tracks and users that had very few
13 notices. Generally what I observed is, like I said, there was
14 a trend here that was a downturn, a decrease, from 2013 to 2014
15 in the quantity of the notices at issue.

16 MR. BUCHANAN: No further questions.

17 THE COURT: Thank you.

18 MR. BUCHANAN: Pass the witness, Your Honor.

19 MR. ZEBRAK: Thank you, Your Honor.

20 THE COURT: Cross-examination. Go ahead.

21 CROSS EXAMINATION

22 BY MR. ZEBRAK:

23 Q. Good afternoon, Dr. Tregillis -- excuse me -- Mr.
24 Tregillis.

25 A. Mr. Tregillis, yes.

1 THE COURT: Let's go for about ten minutes and then
2 it is a good time to break.

3 MR. ZEBRAK: Yes, Your Honor.

4 BY MR. ZEBRAK: (Continuing)

5 Q. Your parents would be proud, I just made you a doctor.

6 Mr. Tregillis, you are by no means serving as a
7 neutral here, are you?

8 A. Correct.

9 Q. Right. So when you talked about acting as a neutral at
10 times, that has nothing to do with your work here, right?

11 A. No, it's similar. I perform accounting, financial, and
12 economic investigations, sometimes I'm on one or the other
13 side. Sometimes I'm in a neutral role. It's a similar
14 process.

15 Q. Sure. Well, let's follow up. You talk about being on a
16 side. Here -- well, first of all, it's Winston & Strawn that
17 hired you. Yes or no, sir?

18 A. Correct.

19 Q. And you are on Winston & Strawn's side, correct?

20 A. I believe they are the ones who have called me to testify
21 here today.

22 Q. And you're obligated to serve their interests, are you
23 not, sir?

24 A. No. I am obligated to serve my own interest. I was hired
25 to perform an investigation, and I do that of my own volition,

1 sticking to my own standards as a CPA.

2 Q. Sir, let's talk about your own interests for a moment.

3 How many times have you been hired by Winston & Strawn, sir?

4 A. Something between five and ten, I think it is.

5 Q. And you indicated -- who is the client? Is it Winston &
6 Strawn or Cox?

7 A. Winston & Strawn is my client.

8 Q. Okay. And you indicated that you did your analysis
9 subject to a set of standards from the AICPA, right?

10 A. Right.

11 Q. Now, doesn't those standards require you to serve your
12 client's interests by seeking to accomplish the objectives
13 established in the matter?

14 A. Yes, it does.

15 Q. Okay. So a moment ago you just said you're not serving
16 their interests, you're only serving your own interests?

17 A. So the interest is my interest to perform my services in
18 an independent manner. And that's what I understand Winston &
19 Strawn has asked me to do.

20 Q. And you believe you have done this work in an independent
21 objective manner; is that correct?

22 A. Yes, I do.

23 Q. Okay.

24 A. Absolutely.

25 Q. Well, another one of the -- well, first of all, you

1 believe you have done your work in compliance with these
2 standards, right?

3 A. Yes.

4 Q. Okay. Another one of these standards is for you to have
5 sufficient relevant data, is it not?

6 A. Yes, I described that earlier.

7 Q. Right. And you're not supposed to do your analysis unless
8 you have sufficient relevant data, correct, sir?

9 A. I think that's right. I am supposed to have sufficient
10 relevant data to support my conclusions. To the extent I
11 express conclusions, I should have support for them.

12 That's one of the problems I had with Dr. Lehr is
13 not -- he's not a CPA, he doesn't have my standards. But if he
14 did, I don't think he would follow my standards.

15 Q. And your conclusions are not neutral conclusions? They
16 are conclusions to serve your client's interests, correct, sir?

17 A. They are neutral --

18 Q. Yes or no, sir.

19 A. No, I disagree with that.

20 Q. Now, the sufficient relevant data standard requires you to
21 obtain sufficient relevant data to afford a reasonable basis
22 for conclusions or recommendations in relation to any
23 professional services performed; is that correct, sir?

24 A. I think that's -- I think that's right, exactly.

25 Q. And that's what you claim you complied with in this

1 manner -- this matter, correct?

2 A. Yes, yes.

3 Q. Now, I think you testified earlier today that you've been
4 an expert over 120 times in matters; is that right?

5 A. Yeah, I think that's right.

6 Q. All right.

7 A. A little over 120 matters in which I've testified.

8 Q. Right. And that doesn't mean necessarily that the courts
9 have admitted you as an expert in all of those cases, that's
10 just the number of matters in which you've been retained,
11 correct?

12 A. That's right. I've testified in right around 50. And in
13 all of those cases I have been admitted. There's no -- none of
14 those in which I wasn't.

15 Q. Sure. Okay. Well, so you've been admitted in all the
16 cases in which you've testified; is that what you said?

17 A. Right.

18 Q. Okay. And similarly, you would've done your work pursuant
19 to these AICPA standards when you've done damages analyses
20 before, right?

21 A. Yes.

22 Q. Right. Well, I'm going to direct you, sir, to a binder
23 that we're going to pass up to you.

24 Can I have the binder, please.

25 So are you familiar with the document behind tab 4?

1 A. This looks like the opinion in the Grupo Televisa case.

2 Q. Now, that was a case where you were hired to perform a
3 damages analysis, was it not?

4 A. That's right. I was on the plaintiff's side in that case.
5 But, yes, doing damage analysis.

6 MR. ZEBRAK: Your Honor, permission to publish this
7 while I impeach?

8 THE COURT: Any objection?

9 MR. BUCHANAN: No objection.

10 THE COURT: It's received. You may publish.

11 MR. ZEBRAK: Well, actually, we're not going to
12 publish it.

13 BY MR. ZEBRAK: (Continuing)

14 Q. I'm just going to ask you, sir, whether in this case, the
15 United States District Court for the Central District of
16 Florida concluded that your calculation of damages is
17 inadmissible because the testimony is not based on sufficient
18 facts or data, and is not the product of reliable principles
19 and methods?

20 A. That's correct. Would you like me to explain why?

21 Q. Well, your counsel can do that later.

22 But just to be clear, this represents an instance
23 where a federal court indicated that your work was not the
24 subject of reliable principles and methods, correct?

25 That's a yes or no, sir.

1 A. I think those are the correct words. I think you read
2 that accurately. Like I said, I'll -- I won't expand on that
3 since you're not asking me to.

4 Q. Well, yes, sir. I mean, you understand the roles for --
5 THE COURT: He answered the question.

6 Q. Okay. And likewise, I correctly read that the Court
7 indicated that your testimony was not based on sufficient facts
8 or data as well, correct?

9 A. I think that's what -- that's what I thought you said
10 before, and I agreed with you before.

11 Q. Okay. And that wasn't the only time where testimony of
12 yours has been rejected by a federal court, has it?

13 A. That's correct.

14 Q. In another case, a Court similarly concluded that your
15 testimony on damages was not the product of a reliable
16 methodology?

17 A. I think that might be the way the Court phrased it, that
18 might be in that opinion.

19 Q. Now, you've reviewed Dr. Lehr's opinions during the course
20 of this litigation, right?

21 A. Yes.

22 Q. And you criticize him for -- well, first of all, you
23 understand that he concluded that data doesn't exist to do an
24 actual damages analysis here, correct?

25 A. Yes.

1 Q. Right. And the reason he has concluded that is because
2 the universe of all the distributions by these Cox subscribers
3 is unknown, correct?

4 A. Yes.

5 Q. And that's because records aren't kept of how many times
6 each of these Cox subscribers distribute those files all around
7 the world, correct?

8 A. Right.

9 Q. Right. And you agree with his analysis that that data
10 doesn't exist, right?

11 A. Yes, I do.

12 Q. Right.

13 A. I think that there is a subset. Which is, when you have a
14 distribution that shows up at another computer, then if it is
15 seen at that other computer in the future, that's evidence of a
16 distribution.

17 Q. Right.

18 A. But it won't be all of them, but you will see some of
19 them.

20 Q. Right. And I think you -- your position is that when you
21 see lots of infringement evidence across different Cox
22 subscribers, you can make the inference that when you see it on
23 date A and date B, that the person got it from an earlier one?
24 Was that your testimony previously?

25 A. Not necessarily, because a Cox subscriber could get it

1 from somewhere else on the peer-to-peer network.

2 Q. Right.

3 A. But when you see that a Cox subscriber would have it
4 available and it would go somewhere, if there was some
5 expansion over time, then you would see it go from one to
6 another to another, and you might see it show up on multiple
7 Cox locations, in which case you'd see more notices.

8 Q. Right. And looking back at your slide, that's the viral
9 network effect with these peer-to-peer networks, right?

10 A. Exactly. That's what I was trying to depict, is the
11 idea --

12 Q. Sure, yeah.

13 A. -- that something could start small and get bigger. I
14 think the way Dr. Lehr referred to it was in a viral way. The
15 evidence didn't support that, but that's the concept I was
16 trying to describe.

17 Q. Right. Well, it spreads like wildfire across a
18 peer-to-peer network, that's the concept illustrated by all
19 those different arrows and dots, right?

20 It's a yes or no question, sir.

21 A. That's what I was trying to depict, again, the data.

22 Q. Okay. And again, sir, that's the data that is unavailable
23 to you for this analysis because those records don't exist,
24 right?

25 A. No, I --

1 Q. That's what you said, right?

2 A. No. I think the data are available to instruct on that.
3 And they tell us that that viral idea you're talking about
4 isn't happening. But I appreciate the concept.

5 Q. Well, sir, that -- what you just mentioned wasn't part of
6 your analysis in this case, was it?

7 A. Yes, it was.

8 Q. Sir, a few moments ago I asked you whether you agreed with
9 Dr. Lehr that actual damages -- that we can't calculate them
10 because the universe of distributions is unknown. And you
11 agreed with me, correct?

12 And that's a yes or no.

13 MR. BUCHANAN: I don't think that was the question,
14 about actual damages, Your Honor.

15 THE COURT: He's --

16 MR. ZEBRAK: Let me move on, Your Honor.

17 THE COURT: He can't determine -- yeah, reask the
18 question.

19 MR. ZEBRAK: Yeah.

20 BY MR. ZEBRAK: (Continuing)

21 Q. Nobody knows how many distributions occurred here,
22 correct?

23 A. I agree with you on that.

24 Q. Right. And it was for that reason that Dr. Lehr was
25 looking at Cox's economic incentives, rather than just doing

1 actual damages analysis, that's what he explained, correct?

2 A. I think that's consistent with his testimony.

3 Q. Right. And so -- but you didn't measure Cox's economic
4 incentives here? You did an actual damages analysis, correct?

5 A. I did an analysis of the harm, the actual harm.

6 Q. Actual harm. Actual harm, right. But you did so without
7 knowing the whole universe of distributions? You didn't factor
8 any of that into your damages analysis? You didn't attribute
9 any monetary amount for that, correct?

10 A. That's correct. I don't think it's necessary.

11 Q. Okay. Well, sir, we have plenty of time to --

12 THE COURT: Ask --

13 MR. ZEBRAK: Well, we can stop now.

14 THE COURT: Don't testify, yeah. All right.

15 All right, let's take our lunch break, and we'll come
16 back about five minutes after 2:00. I have a matter while
17 we're all at -- you're all at lunch here. So if you hear some
18 rumbling in the courtroom, there's something going on, but it's
19 not this case.

20 So you're excused. Have a good lunch. Thank you.

21 We'll see you at five minutes after 2:00. All right.

22 NOTE: At this point the jury leaves the courtroom;
23 whereupon the case continues as follows:

24 JURY OUT

25 THE COURT: All right. So I have a plea at 1:10. So

1 just clear the front table, would be all we need.

2 Anything before we break?

3 MR. ZEBRAK: I don't believe so from the plaintiffs,
4 Your Honor.

5 THE COURT: All right. Let's leave the binders where
6 they are and not take them out of the courthouse -- courtroom.

7 All right. We're in recess.

8 NOTE: The morning portion of the proceedings on
9 December 17, 2019, is concluded.

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CERTIFICATE OF COURT REPORTERS

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19 We certify that the foregoing is a true and
accurate transcription of our stenographic notes.

20

21

22 /s/ Norman B. Linnell
Norman B. Linnell, RPR, CM, VCE, FCRR

23

24

25

/s/ Anneliese J. Thomson
Anneliese J. Thomson, RDR, CRR